

FEDERAL COURT OF AUSTRALIA

Singh v Minister for Immigration and Border Protection [2018] FCAFC 52

Appeal from:	<i>Singh v Minister for Immigration and Border Protection</i> [2017] FCCA 2198
File number:	NSD 1689 of 2017
Judges:	BROMBERG, GRIFFITHS AND MOSHINSKY JJ
Date of judgment:	5 April 2018
Catchwords:	MIGRATION – appeal from a judgment of the Federal Circuit Court of Australia – where a fraudulent IELTS test report was provided to the Department – where the appellant claimed that his brother-in-law had altered the appellant’s original IELTS test report without the appellant’s authority, knowledge or complicity, and gave the altered IELTS test report to a migration agent who then provided it to the Department – whether the altered IELTS test report was a “bogus document” or “information that is false or misleading in a material particular” for the purposes of Public Interest Criterion 4020 (PIC 4020) – whether in these circumstances the appellant had “given, or caused to be given” to the Department a bogus document, or information that is false or misleading in a material particular, such that PIC 4020 was not satisfied – whether the primary judge erred in finding that the AAT did not commit jurisdictional error by misconstruing or misapplying PIC 4020 – whether the primary judge erred in finding that the AAT did not commit jurisdictional error by concluding that PIC 4020 was not satisfied in these circumstances – appeal dismissed, with costs
Legislation:	<i>Migration Act 1958</i> (Cth), ss 5, 48, 97, 98, 100, 103, 111 <i>Migration Regulations 1994</i> (Cth), Schedule 2, cl 457.224; Schedule 4, Public Interest Criterion 4020
Cases cited:	<i>Arora v Minister for Immigration and Border Protection</i> [2016] FCAFC 35; 238 FCR 153 <i>Coulton v Holcombe</i> [1986] HCA 33; 162 CLR 1 <i>CQG15 v Minister for Immigration and Border Protection</i> [2016] FCAFC 146 <i>DAO16 v Minister for Immigration and Border Protection</i> [2018] FCAFC 2 <i>Gill v Minister for Immigration and Border Protection</i>

[2016] FCAFC 142; 248 FCR 398
Graham v Minister for Immigration and Border Protection;
Te Puia v Minister for Immigration and Border Protection
 [2017] HCA 33
Maharjan v Minister for Immigration and Border Protection [2017] FCAFC 213
McDonald v Director-General of Social Security (1984) 1 FCR 354
Minister for Immigration and Border Protection v Singh (2014) 231 FCR 437
Minister for Immigration and Citizenship v SZMDS [2010] HCA 16; 240 CLR 611
Minister for Immigration and Multicultural Affairs v Eshetu [1999] HCA 21; 197 CLR 611
Murad v Assistant Minister for Immigration and Border Protection [2017] FCAFC 73; 250 FCR 510
Park v Brothers [2005] HCA 73; 222 ALR 421
Patel v Minister for Immigration and Border Protection [2015] FCAFC 22
Prodduturi v Minister for Immigration and Border Protection [2015] FCAFC 5; 144 ALD 243
Re Patterson; Ex parte Taylor (2001) 207 CLR 391
Singh v Minister for Immigration and Border Protection [2015] FCAFC 151
Singh v Minister for Immigration and Border Protection [2016] FCAFC 141; 247 FCR 554
Sran v Minister for Immigration and Citizenship [2014] FCCA 37
Suttor v Gundowda Pty Ltd [1950] HCA 35; 81 CLR 418
SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs [2006] HCA 63; 228 CLR 152
SZFDE v Minister for Immigration and Citizenship [2007] HCA 35; 232 CLR 189
SZLGP v Minister for Immigration and Citizenship [2008] FCA 1198
SZRUR v Minister for Immigration and Border Protection [2013] FCAFC 146; 216 FCR 445
SZSXT v Minister for Immigration and Border Protection [2014] FCAFC 40; 222 FCR 73
Trivedi v Minister for Immigration and Border Protection [2014] FCAFC 42; 220 FCR 169
University of Wollongong v Metwally (No 2) [1985] HCA 28; 59 ALJR 481
Vyas v Minister for Immigration and Citizenship [2012] FMCA 92; 263 FLR 131

Water Board v Moustakas [1988] HCA 12; 180 CLR 491
Zhang v Minister for Immigration and Border Protection
[2016] FCA 921

Date of hearing:	15 February 2018
Date of last submissions:	22 February 2018
Registry:	New South Wales
Division:	General Division
National Practice Area:	Administrative and Constitutional Law and Human Rights
Category:	Catchwords
Number of paragraphs:	161
Solicitor for the Appellant:	Mr M E Arch of Concordia Pacific
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Solicitor for the First Respondent:	MinterEllison
Counsel for the Second Respondent:	The Second Respondent filed a submitting notice, save as to costs

ORDERS

NSD 1689 of 2017

BETWEEN: PRABHJOT SINGH
Appellant

AND: MINISTER FOR IMMIGRATION AND BORDER
PROTECTION
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

JUDGES: BROMBERG, GRIFFITHS AND MOSHINSKY JJ

DATE OF ORDER: 5 APRIL 2018

THE COURT ORDERS THAT:

1. 1. The appeal be dismissed.
2. 2. The appellant pay the first respondent's costs, as agreed or assessed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

BROMBERG J:

1 For the reasons expressed by Griffiths and Moshinsky JJ, I joined with their Honours in dismissing Mr Singh’s application to raise a new ground on this appeal. However, I respectfully differ from their Honour’s conclusion that the appeal should be dismissed.

2 The reasons for judgment of Griffiths and Moshinsky JJ set out the relevant factual and procedural background, the relevant extracts of the decision of the Administrative Appeals Tribunal (“AAT”) and the statutory provisions which require consideration, including the *Migration Act 1958* (Cth) (“**the Act**”) and Public Interest Criterion 4020 set out in Sch 4 of the *Migration Regulations 1994* (Cth) (“**PIC 4020**”). A survey of relevant authorities is also set out there. The reader will need to have reference to that material to understand how and why I have arrived at a different conclusion to that reached by Griffiths and Moshinsky JJ. It is not necessary that I recount the material that their Honours have set out in their reasons here.

3 Central to Mr Singh’s appeal is the proposition that PIC 4020(1) does not impose absolute or strict liability on a visa applicant whenever a bogus document is provided to the Minister irrespective of its source and, in particular, when the provision of the bogus document to the Minister is the product of a fraud perpetrated upon the visa applicant by a third party.

4 That proposition should be accepted. It is supported by both the text of PIC 4020(1) and by Full Court authority.

5 *First*, and as to the text, the criteria of engagement of PIC 4020(1) is that “the applicant **has given, or caused to be given**, to the Minister ... a bogus document or information that is false or misleading in a material particular ...” (emphasis added). The text may well deal with more than merely the physical transfer of a document or of information from a visa applicant to the Minister. But at the least, PIC 4020(1) is concerned with whether the document or information was provided *by* the visa applicant *to* the Minister. To that extent, its text may sensibly be read as providing that PIC 4020(1) is only engaged where the bogus document or false or misleading information is either directly provided to the Minister (or his or her delegate) by the visa applicant or the visa applicant bears sufficient

responsibility for its provision to enable the conclusion that the visa applicant “caused [the document or information] to be given”.

6 6 The underlying policy considerations for the enactment of the PIC 4020 referred to by Buchanan J (with whom Allsop CJ and Rangiah J agreed) in *Trivedi v Minister for Immigration and Border Protection* [2014] FCAFC 42 at [49], to the effect that the administration of the visa system ought not be encumbered with the positive burden of establishing that the visa applicant knew that the content of the information provided to the Minister was false, support the constructional conclusion that it is only the visa applicant’s responsibility for the physical transfer of the document or information with which PIC 4020(1) is concerned. However, neither the text of the provision nor, in my view, the observation made in *Trivedi* at [49] (to which I will return), support a conclusion that PIC 4020(1) is engaged where a visa applicant bears no responsibility for the physical provision of the document or information to the Minister. The text of PIC 4020(1) envisages some act or omission for which the visa applicant bears responsibility. The document or information must be “given or caused to be given”. If strict or absolute liability had been intended to be imposed on a visa applicant for the fact that the Minister had received a bogus document or false information, then the text of PIC 4020(1) would have focused upon the receipt of the document or information by the Minister rather than its provision to the Minister by the visa applicant.

7 7 The consequences upon a visa applicant of the engagement of PIC 4020(1) are serious. Subject to some qualification (see PIC 4020(4)), PIC 4020(2) imposes a three year prohibition on the grant of a visa where a visa applicant, or any member of the family unit of that applicant, has been refused a visa because of a prior failure to satisfy PIC 4020(1). In that context, a court ought to be slow to impute an intent to impose liability absent responsibility unless, by clear words, that intent is manifest.

8 8 *Second*, the Full Court in *Gill v Minister for Immigration and Border Protection* [2016] FCAFC 142 (Kenny, Griffiths and Mortimer JJ), in a passage later endorsed by Gilmour and Mortimer JJ in *Maharjan v Minister for Immigration and Border Protection* [2017] FCAFC 213 at [52], specifically accepted that the operation of PIC 4020 was capable of being affected by fraud. Implicit in that acceptance is an acceptance that PIC 4020(1) does not impose on a visa applicant strict or absolute liability when a bogus document or false

information is received by the Minister in relation to that person's application for a visa. At [50], Kenny, Griffiths and Mortimer JJ said this (emphasis added):

We accept the appellant's submission that the operation of provisions such as ss 45 to 48 and 98 of the Migration Act *and PIC 4020* can be affected by the fraudulent conduct of a migration agent in circumstances where the visa applicant has not colluded in that fraud and there is no evidence to support a finding that the visa applicant was indifferent as to whether the agent used unlawful or dishonest means to obtain a visa. As noted above, the Minister ultimately did not contest that s 98 would not apply to a visa applicant who has relied upon a migration agent to fill out a visa application form and the agent perpetrates a fraud on the visa applicant. In our view, that acknowledgment was properly given.

9 9 Having endorsed that "statement of principle", Gilmour and Mortimer JJ in *Maharjan* (at [53]) went on to say that, while the principle was applicable to the conduct of migration agents, it was "equally applicable to the conduct of any third party engaging in fraudulent conduct for the purposes of obtaining a visa for an applicant".

10 10 I turn then to consider what the AAT did and, in particular, whether the AAT construed PIC 4020(1) as imposing strict liability upon Mr Singh for the bogus document received by the Minister in the course of Mr Singh's application for a visa.

11 11 At [19], the AAT relied on *Trivedi* for its conclusion that "it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged". Having held that the IELTS test report form received by the Minister in relation to Mr Singh's visa application was a "fraudulent document", the AAT then said (at [21], emphasis added) that "*therefore ... the applicant has given, or caused to be given, to the Minister or an officer of the Department, a bogus document ...*". At [22] the AAT then said this (emphasis added):

Accordingly, the Tribunal finds that the applicant has given or caused to be given to the Minister ... a bogus document or information that is false or misleading in a material particular in relation to the application for the visa. The applicant has claimed that he was not aware that that the document had been altered. However, it is unnecessary for the Tribunal to consider whether the applicant knew he was providing a bogus document (see *Vyas, Trivedi, and Sran*). *Accordingly*, the Tribunal finds that the applicant does not meet the requirements of PIC 4020(1).

12 12 Insofar as the AAT engaged with the question of whether and to what extent Mr Singh "caused" the bogus document to be given to the Minister, the engagement was confined to whether his knowledge that the document was bogus was relevant and, on that issue, the AAT determined that it was not. The AAT did not otherwise engage with whether, by reason of

any act or omission of Mr Singh, it could be concluded that Mr Singh bore responsibility for the physical provision of the bogus document to the Minister.

13 13 The provision of the bogus document to the Minister occurred in circumstances where, unlike the facts considered in *Trivedi*, Mr Singh did not merely rely upon an absence of knowledge as to the content of the document received by the Minister, but denied being involved in providing the document to the Minister. He asserted that it was his brother-in-law who had provided or caused the bogus document to be provided to the Minister in circumstances where, having provided the genuine document to his brother-in-law to pass onto Mr Singh's migration agent, the brother-in-law substituted the genuine document for the bogus document in an attempt to deliberately sabotage Mr Singh's application for a visa.

14 14 That this was a serious allegation of fraud upon Mr Singh must have been appreciated by the AAT. That the allegations were curious, as they seem to be, is not presently relevant. It may have been open to the AAT to dismiss the claim as lacking credibility. Alternatively, it may have been open to the AAT to accept that the brother-in-law had acted as Mr Singh claimed, but nevertheless come to the view that Mr Singh bore sufficient responsibility for the provision of the document to the Minister to permit the conclusion that he "caused [it] to be given".

15 15 But that such results were open to the AAT misses the point. It is not the role of this Court to undertake the statutory task entrusted to the AAT, but rather, to assess whether the exercise of power by the AAT was carried out according to law: *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437 at [45]. The statutory task entrusted to the AAT required it, as the repository of power under the Act, to inquire and determine whether Mr Singh bore sufficient responsibility for the provision of the bogus document to the Minister to enable the conclusion that he had "caused [the bogus document] to be given". The AAT misconstrued PIC 4020(1). It wrongly proceeded on the basis that PIC 4020(1) was engaged in the absence of any need to evaluate whether Mr Singh bore any responsibility for the provision of the bogus document. In other words, the AAT wrongly construed PIC 4020(1) as imposing strict liability on Mr Singh. By misconceiving what the exercise of the statutory power entailed the AAT fell into jurisdictional error: *Graham v Minister for Immigration and Border Protection*; *Te Puia v Minister for Immigration and Border Protection* [2017] HCA 33 at [68] (Kiefel CJ, Bell, Gageler, Keane, Nettle, and Gordon JJ);

Re Patterson; Ex parte Taylor (2001) 207 CLR 391 at [82] (Gaudron J) and [196] (Gummow and Hayne JJ).

Returning then to *Trivedi*, in my respectful view, Mortimer and Gilmour JJ in *Maharjan* at [75] correctly stated the principle from [49] of *Trivedi* when their Honours said this:

... What Buchanan J rejected (with Allsop CJ and Rangiah J agreeing) was the proposition that there was, on the proper construction of PIC 4020, a positive requirement imposed upon the Minister and his or her delegates to be satisfied about a particular state of mind of a visa applicant in relation to information that had been established to be false or misleading, in the sense of being purposely untrue, before PIC 4020 could be applied. As we have set out above, there were good reasons of both construction and policy for that conclusion to be reached.

Trivedi supports the AAT's conclusion that it did not need to examine whether Mr Singh knew that the document in question was bogus. That is because, as *Trivedi* determined, PIC 4020(1) does not require the Minister (or on review the AAT) to form any positive state of satisfaction about the knowledge of a visa applicant. But that, as Gilmour and Mortimer JJ said in *Maharjan* at [76], "is quite a different proposition from the third party fraud arguments now under consideration". In my view, *Trivedi* does not support the proposition that the Minister (or on review the AAT), is entitled to avoid an inquiry as to whether the visa applicant bore responsibility for the provision of the bogus document to the Minister. In other words, and consistently with the ordinary meaning of the text, *Trivedi* does not support the proposition that PIC 4020(1) imposes strict or absolute liability upon a visa applicant so that its operation is engaged irrespective of whether a visa applicant bears responsibility for the provision of a bogus document to the Minister.

For those reasons, I consider that because it misconstrued PIC 4020(1), the AAT failed to engage with the requisite statutory task of determining whether Mr Singh bore sufficient responsibility to enable the conclusion that he had caused the bogus document to be provided to the Minister. That failure amounted to jurisdictional error. The primary judge erred in failing to identify that error.

The Minister's reliance upon s 98 of the Act is misplaced as s 98 deals with a different subject to that addressed by PIC 4020(1). In any event, s 98 will not apply where a fraud has been perpetrated upon a visa applicant: *Gill* at [50].

In my view, Mr Singh's appeal should be upheld.

I certify that the preceding twenty (20) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Bromberg.

Associate:

Dated: 5 April 2018

REASONS FOR JUDGMENT

GRIFFITHS AND MOSHINSKY JJ:

INTRODUCTION	[21]
SUMMARY OF BACKGROUND FACTS	[26]
<i>(a) The delegate's decision(s)</i>	[26]
<i>(b) The AAT proceeding</i>	[33]
<i>(c) FCCA's reasons for judgment summarised</i>	[51]
THE APPEAL	[53]
<i>(a) The application for leave to raise a new ground on appeal</i>	[55]
<i>(b) The parties' submissions summarised</i>	[65]
<i>(c) Analysis of some relevant case law</i>	[78]
<i>(i) Trivedi</i>	[79]
<i>(ii) Patel</i>	[89]
<i>(iii) Zhang</i>	[95]
<i>(iv) Prodduturi</i>	[102]
<i>(v) Arora</i>	[112]
<i>(vi) Gill</i>	[116]
<i>(vii) Singh 2016</i>	[124]
<i>(viii) Maharjan</i>	[129]
<i>(d) Disposition of the appeal</i>	[144]
CONCLUSION	[161]

INTRODUCTION

21 21 This appeal is from a judgment dated 11 September 2017 of the Federal Circuit Court of Australia (FCCA). The reasons for judgment are reported as *Singh v Minister for Immigration and Border Protection* [2017] FCCA 2198. The FCCA dismissed an application for judicial review of a decision dated 16 February 2017 of the Administrative Appeals Tribunal (AAT). The AAT affirmed the decision of the Minister's delegate not to grant the appellant a Temporary Business Entry (Class UC) (subclass 457) visa. The criteria for the grant of such a visa required the appellant to have competent English, which involved the appellant obtaining an IELTS (International English Language Testing System) score of at

least 4.5 for each of the four test components of speaking, reading, writing and listening. Another requirement for that visa was that the appellant met Public Interest Criterion 4020 (PIC 4020), which is set out in Sch 4 to the *Migration Regulations 1994* (Cth) (the *Regulations*).

22 22 The central issue in the appeal is whether the FCCA erred in not accepting the appellant's case that, for two reasons, the AAT had fallen into jurisdictional error when it rejected the appellant's argument that PIC 4020 was satisfied in his circumstances. In particular, the appellant contended that the AAT had either misconstrued or misapplied PIC 4020 or otherwise acted unreasonably or illogically in concluding that PIC 4020 was not satisfied in circumstances where the appellant claimed that, without his knowledge or complicity, a third party who was intent upon sabotaging his visa application provided a bogus document to the appellant's migration agent, who then provided the bogus document together with other material concerning the appellant's visa application to the Department. The bogus document comprised the appellant's IELTS test results, which had been altered so as to give him higher scores than he had actually obtained. It was not contested that the appellant's real results were insufficient for him to meet the requisite English standard criterion.

23 23 One of the many curiosities in this proceeding is why someone who was allegedly intent upon sabotaging the appellant's visa application would fraudulently increase his test results in circumstances where it was possible that the visa application would fail in any event because, in actual fact, the appellant had not achieved the requisite standard of English to qualify for the visa.

24 24 In brief, the central issue on the appeal is whether the primary judge erred in not accepting the appellant's contention that, in all these circumstances, it was not open to the AAT to conclude that he had "given or caused to be given" a bogus document or information that was false or misleading in a material particular for the purposes of PIC 4020.

25 25 It is desirable to provide a brief summary of the background facts, including those relating to the decision(s) by the delegate, the AAT and the primary judge.

SUMMARY OF BACKGROUND FACTS

(a) The delegate's decision(s)

26 26 It is not clear from the materials in the Appeal Book whether the appellant made one or two applications for the relevant visa. The AAT stated that it had conducted a review of two decisions to refuse to grant the appellant a subclass 457 visa. The Appeal Book contained only a single application for such a visa, which application is dated 14 April 2015 .

27 27 It appears that the appellant's visa application was rejected by the Minister's delegate on 14 July 2015 and again on 6 November 2015. The delegate's decision dated 14 July 2015 was included in the Appeal Book, but not the decision dated 6 November 2015.

28 28 The basis of the delegate's decision dated 14 July 2015 for not granting the appellant a subclass 457 visa is the delegate's finding that the appellant did not satisfy the requirements of cl 457.224 of Sch 2 to the *Regulations* because, for the reasons summarised above, he did not satisfy PIC 4020.

29 29 Upon receipt of the appellant's initial visa application, the Department noted that there was a discrepancy between the IELTS test result it had received from the appellant's migration agent and the actual result which was published by the relevant service provider. The Department invited the appellant to comment on the discrepancy. In response, the Department received a letter dated 28 April 2015 from the appellant's sister, who was also his sponsor for the visa. In brief, she said that she owned a café in Leeton where the appellant (her brother) had worked as a chef for 20 hours per week since late 2014. She explained that she decided to sponsor him for a subclass 457 visa so that he could work full time for her. She said that she had asked her husband to assist in lodging the visa application for her brother, which the husband did online. However, she said that her husband preferred a friend of his to be sponsored for the position (even though he did not have relevant experience or qualifications), and that she and her husband had had a dispute about the matter. She claimed that her husband used the computer to falsify the appellant's IELTS results before sending the documents to a migration agent. The sister said that she only learned of her husband's actions when the Department wrote to the appellant about the inconsistency in the test results. She provided the Department with the correct IELTS results dated 7 June 2014, as well as a letter dated 28 April 2015 from her husband. As noted above, the correct results revealed that the appellant did not satisfy the relevant criterion concerning his standard of English to be granted a subclass 457 visa.

30 30 The full contents of the sister's letter dated 28 April 2015 are as follows (without alteration):

To,
Department of Immigration and Border Protection,
457 Processing Centre,
Melbourne, VIC
Temporary Work (Skilled) (457)
Application Number – 475579624
TRN – EGO8BNX832
Date – 28/04/2015

To whom it may concern,

Dear sir / Madam,

My name is Gurvinder Kaur Janday and I am the owner of Movie Café in Leeton NSW 2705. I am writing this letter in regards of my employee Prabhjot Singh DOB 02/03/1986. Prabhjot has been working for us in our café since late last year as chef. I appointed him to work for me on behalf of his qualifications and his past working experiences in food industry. Prabhjot has been very loyal and hardworking employee since he is started working with us but due to his visa status at that time we have appointed him its only allows him to work 20 hours per week, so I decided to apply for subclass 457 visa so he can work full time with us and help me run my business. Last week he received a letter from you guys stating that he had misled you with false document of his IELTS.

I just want to justify this Prabhjot has giving me all of his required document which required by me to lodge his application for subclass 457 visa and I have giving all those document to my husband Ravinder Singh Janday to process it on the computer as I work full time job as well so due to lack of time I ask my husband to help me with his application.

My husband never wants to sponsor Prabhjot Singh because he wants one of his friends to be sponsored through our café but that person does not have any required qualification and never worked in food industry before so I refused my husband to lodge his friend's application. Since that day he is having conflict with me regarding this matter and also wants to close the business but I want to keep the business. Due to our family dispute while my husband was sending all the required document to our migration agent who is CECA in Melbourne, he make a false IELTS document through photoshoot and change all his results without us noticing, he send it to CECA and they thought the document they received all are valid and true, so they processed Prabhjot Singh application.

Last week when I saw your letter I was so shocked and then I asked my husband to explain this, he agreed that yes he did it to mislead Prabhjot application so he can apply his friend's application.

Prabhjot has been very depressed since that day and very upset regarding his future, he trusted me and my family to support him with his application but due to my husband selfishness, I really do not want his career to be ruined. He is very honest

and loyal person and very hardworking. He manages my business and since he had started working with us my business is doing very good. He had worked so hard and put so much his effort to build my business.

I have attached his true verified copy of his IELTS document and also willing to come to see you guys personally if you wish to see Prabhjot original documents. It is my humble request to you to please consider your decision wisely as someone whole future is in your precious hands and also the future of my business is also based on your decision as well. So it is my very humble request to you to please consider his application wisely, I have also attached the letter of clarification from my husband regarding him been misleading you guys with Prabhjot application.

Please do not hesitate to contact me on below given number if you need more clarification regarding this matter.

Yours sincerely

Gurvinder Kaur Janday

[Signature]

Contact – [mobile telephone number]

Email id [email address]

31 31 It is desirable to also set out the full contents of the husband's letter dated 28 April 2015 (i.e. without alteration) which, as noted above, was provided to the Department under cover of the sister's letter (noting that the same address details and typographical errors appear in the formal introductory parts of both letters and that both letters use identical and somewhat unusual expressions, such as "you guys" and "please consider your decision wisely"):

To,

Department of Immigration and Border Protection,

457 Processing Centre,

Melbourne, VIC

Temporary Work (Skilled) (457)

Application Number – 475579624

TRN – EGO8BNX832

Date – 28/04/2015

To whom it may concern,

Dear sir / Madam,

My name is Ravinder Singh Janday husband of Gurvinder kaur Janday. I just want to let you guys know that I assisted my wife with Prabhjot Singh application who work as a chef in our café in Leeton NSW. Whilst I was preparing all those document to

send it to our migration agent CECA in Melbourne, I agreed I have changed Prabhjot Singh IELTS results by using photoshoot software on the computer in order to misled you guys so that you guys can reject his file and so that I can apply for my friend application.

I do understand in doing that I have misled you and also fraud you and Prabhjot Singh, I do apologise you of what I have done and I am feeling very bad about it. I really don't want to ruin some innocent life so please consider your decision wisely.

Yours Sincerely

Ravinder Singh

[Signature]

32 32 On 14 July 2015, the delegate found that the appellant had given or caused to be given a document that was considered to be bogus, or information that was considered to be false or misleading. Accordingly, the delegate found that PIC 4020 applied. The delegate declined to waive that provision on the grounds of compelling or compassionate circumstances.

(b) The AAT proceeding

33 33 On 4 August 2015, by an online application, the appellant sought a review by the AAT of the delegate's decision dated 14 July 2015. It appears that he also sought a review of the delegate's decision dated 6 November 2015, however, as noted above, the Appeal Book did not contain a copy of any such AAT application nor a copy of the delegate's 6 November 2015 decision.

34 34 In early January 2016, the appellant wrote to the AAT in support of his application for review. He said that he was not aware of the bogus IELTS report "when I have submitted my application". He said that "due to family conflicts my brother in law provided the bogus document to the Agent to lodge this file thinking that this file will be rejected in the future". He said that his sister was affected by the decision to refuse him a visa because she was struggling to run the café business and she had hoped that he would be granted a visa and be able to help her in her business, adding that she was also a registered nurse at the local hospital.

35 35 In a statutory declaration dated 2 November 2015, which was in evidence before the AAT, the appellant's sister claimed that her husband is "a typical controlling Indian male" and is "abusive, cause's (sic) emotional and psychological violence". She swore that, in "order to control me financially, he accepted that he falsified [the appellant's] IETLS so that he can get his friend and control the business while I am working as a Nurse in rotating shift (sic)".

36 36 It appears that both the appellant and his sister gave evidence in the AAT, but not the sister's husband. Nor apparently did the appellant's original migration agent give evidence (noting that it appears that the appellant changed migration agents in March 2017). Neither party sought to tender a copy of the transcript of the AAT hearing in the present appeal. There are, however, several references in the AAT's reasons for decision to evidence which was given by both the appellant and his sister in the course of the AAT hearing.

37 37 The AAT decision is dated 16 February 2017. In view of its central importance to the appellant's case on the appeal, it is necessary to set out [14] of the AAT's reasons for decision:

14. The applicant stated that he had had all the documents provided with the visa application certified and he then provided the certified documents to his brother-in-law who had made the arrangements with a migration agent. The applicant had not had any direct contact with the migration agent. The applicant confirmed that his brother-in-law had altered the IELTS test report results. The Tribunal asked why, if his brother-in-law did not want the applicant to be granted the visa or to stay in Australia, his brother-in-law would have altered the IELTS results by giving the applicant a higher score than the score he actually achieved. The applicant stated that he is not really sure what his brother-in-law did. Perhaps his brother-in-law knew, from the migration agent, that the Department would verify the results and if it was found that the results had been altered then the visa would certainly be refused and the applicant would have to depart Australia. The Tribunal indicated that it was difficult to understand as it would seem that the applicant might not have achieved the required English-language results. Therefore, if his correct results had been submitted he may well have been refused the visa anyway; it had been a requirement for the grant of a Subclass 457 visa that an applicant achieve a score of at least 4.5 in each of the four test components and the applicant only had a score of 4 for the reading component. The applicant stated that perhaps his brother-in-law wanted the applicant to be accused of fraud as then he might never be able to return to Australia.

38 38 The AAT made reference at [14] of its reasons for decision to the appellant's evidence that he had had all the documents provided with his visa application certified and that he then provided the certified documents to his brother-in-law, no doubt with a view to the brother-in-law forwarding the documents to the Department in support of the appellant's visa application. The AAT made no express reference, however, to the fact that the certification stamp which appeared on the bogus document was the same as the certification stamp which appeared on all the other certified documents, yet curiously the alleged true copy of the IELTS test results bore a different certification stamp, and was purportedly completed by a different person to the certifier of all the other documents provided to the Department in support of the appellant's visa application (including the bogus document). This apparent

discrepancy is unexplained and it is unclear whether the AAT raised the issue with the appellant.

39 39 The AAT stated at [15]-[16] of its reasons for decision that the appellant's sister had confirmed that her husband had altered the results. She is recorded there by the AAT as claiming that her husband had engaged the original migration agent. She claimed that although neither she nor the appellant had ever spoken directly to that agent, the husband was doing things behind the scenes to stop her brother from staying in Australia. She said that her husband had been told by the migration agent that if the appellant "provided false documents the department would automatically refuse the visa application".

40 40 Against that background summary, the AAT then turned its attention to whether the appellant had given, or caused to be given, a bogus document or information that is false or misleading in a material particular for the purposes of PIC 4020. As noted above, compliance with PIC 4020 was one of the criteria for a subclass 457 visa.

41 41 PIC 4020(1), (2), (4) and (5), which are contained in Sch 4 to the *Regulations*, provided as follows (emphasis added in cl 4020(1)):

4020 (1) There is no evidence before the Minister that **the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5-reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:**

- (a) **the application for the visa;** or
- (b) a visa that the applicant held in the period of 12 months before the application was made.

(2) The Minister is satisfied that during the period:

- (a) starting 3 years before the application was made; and
- (b) ending when the Minister makes a decision to grant or refuse to grant the visa;

the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).

...

(4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:

- (a) compelling circumstances that affect the interests of Australia; or

- (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;

justify the granting of the visa.

- (5) In this clause:

information that is false or misleading in a material particular means information that is:

- (a) false or misleading at the time it is given; and
- (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

Note: For the definition of bogus document, see subsection 5(1) of the Act.

42 42 As at 16 February 2017, the term “bogus document” was (and still is) defined in s 5(1) of the *Act* as follows (noting that prior to 18 April 2015 the definition was set out in s 97 of the *Act*):

5 Interpretation

- (1). In this Act, unless the contrary intention appears:

...

bogus document in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

43 43 Although not referred to by the AAT in its reasons for decision, it is necessary to also note s 98 of the *Act*:

98 Completion of visa application

A non-citizen who does not fill in his or her application form or passenger card is taken to do so if he or she causes it to be filled in or if it is otherwise filled in on his or her behalf.

44 44 For the purposes of Pt 2, Div 3, Subdiv C, the expression “application form” is defined in s 97 of the *Act*:

97 Interpretation

In this Subdivision:

application form, in relation to a non-citizen, means a form on which a non-citizen applies for a visa, being a form that regulations made for the purposes of section 46 allow to be used for making the application.

...

Note: **Bogus document** is defined in subsection 5(1).

45 45 Finally, although not referred to by the AAT in its reasons for decision, s 48(1) of the *Act* should be noted as a provision which limited the types of visas for which a visa applicant could apply following the refusal of a previous visa application:

48 Non-citizen refused a visa or whose visa cancelled may only apply for particular visas

(1) A non-citizen in the migration zone who:

(a) does not hold a substantive visa; and

(b) after last entering Australia:

(i) was refused a visa, other than a refusal of a bridging visa or a refusal under section 501, 501A or 501B, for which the non-citizen had applied (whether or not the application has been finally determined); or

...

may, subject to the regulations, apply for a visa of a class prescribed for the purposes of this section or have an application for such a visa made on his or her behalf, but not for a visa of any other class.

...

46 46 The AAT stated at [18] that PIC 4020 applies “whether or not the document or information was provided by the [visa applicant] knowingly or unwittingly”. It added at [19] that while information must be “purposely untrue” so as to attract PIC 4020, “it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged”. It added, however, that “an element of fraud or deception by some person is necessary to attract the operation of the provision”, citing *Trivedi v Minister for Immigration and Border Protection* [2014] FCAFC 42; 220 FCR 169 (*Trivedi*).

47 47 The AAT’s critical findings are set out in [21] and [22] of its reasons for decision (footnotes omitted):

21. Having considered all the evidence, the Tribunal finds that the IELTS test report form, for a test undertaken on 7 June 2014, which was provided to the Department by the applicant as part of the application for the Subclass 457 visa, had been altered by someone who did not have authority to alter it or

that it is a fraudulent document. The Tribunal finds, therefore, that the applicant has given, or caused to be given, to the Minister or an officer of the Department, a bogus document (within the meaning of paragraph (b) of the definition of ‘bogus document’ in s.97 of the Act) because it is either not genuine and, therefore, counterfeit; or has been altered by somebody who does not have authority to do so.

22. Accordingly, the Tribunal finds that the applicant has given or caused to be given to the Minister, an officer, the Migration Review Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa. The applicant has claimed that he was not aware that that [sic] the document had been altered. However, it is unnecessary for the Tribunal to consider whether the applicant knew he was providing a bogus document (see *Vyas, Trivedi* and *Sran*). Accordingly, the Tribunal finds that the applicant does not meet the requirements of PIC 4020(1).

48 48 There are three matters to note in relation to these central findings:

- (1) (1) although the AAT found that “someone” without authority had altered the IELTS test result (or that it is a fraudulent document), the AAT did not identify who that person was, nor did it make any express finding as to that person’s motivation for having altered the test result;
- (2) (2) the AAT took the view that, following cases such as *Trivedi*, it did not need to consider whether the appellant knew that he was providing a bogus document and, therefore, the AAT made no findings as to the appellant’s knowledge or complicity; and
- (3) (3) the AAT’s reference in [21] to “paragraph (b) of the definition of ‘bogus document’ in s.97 of the Act” should be understood as picking up the definition of “bogus document” in s 5(1) (which is set out in [42] above).

49 49 The AAT then explained at [26]-[47] why it was not satisfied that the relevant requirements of PIC 4020 should be waived on the basis of “compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen...that justify the granting of the visa”.

50 50 At [49] of its reasons for decision, the AAT affirmed what it described as “the decision” not to grant the appellant the visa. This conclusion was apparently intended to apply to both the primary decisions made on 14 July 2015 and 6 November 2015 respectively (see [27] above).

(c) FCCA's reasons for judgment summarised

51 51 As noted above, the appellant sought judicial review of the AAT's decision in the FCCA. He was represented in the FCCA by Mr Arch, the same solicitor who represented him in the appeal. He raised two grounds of judicial review below. It is desirable to set out the full terms of both grounds:

Grounds of application

Ground 1: The second respondent, the Administrative Appeals Tribunal erred in finding that the applicant had "given, or caused to be given" to the Minister or an officer of the Department a bogus document within the meaning of Public Interest Criterion 4020 of *Schedule 4* of the *Migration Regulations*, namely an allegedly altered or fraudulent IELTS test result report. The Tribunal thus erred in law and committed jurisdictional error.

Particulars

1. The evidence before the Tribunal established that the IELTS test result report was altered by the applicant's brother-in-law, without the applicant's knowledge, participation or consent.
2. The evidence before the Tribunal established that the applicant's brother-in-law was solely responsible for transmitting the fraudulent IELTS test result report to a migration agent for the purpose of lodging the document with the Department.
3. The evidence before the Tribunal established that the applicant did not have any direct contact with the migration agent in relation to the application.

Ground 2: The Tribunal misinterpreted Public Interest Criterion 4020 and thus erred in law and committed jurisdictional error.

Particulars

1. The Tribunal erroneously concluded that Public Interest Criterion 4020 may be engaged in circumstances where a third party creates a bogus document and arranges for that bogus document to be given to the Department, without the knowledge, participation or consent of the applicant, where the third party engages in such conduct with the specific purpose of undermining the applicant's visa application or otherwise damaging the applicant's legal rights.
2. The Tribunal erroneously concluded that Public Interest Criterion 4020 may be interpreted so as to impose absolute liability on an applicant whenever a bogus document is submitted to the Department, notwithstanding the supervening conduct of a third party acting with ill intent toward the applicant.
3. The Tribunal erroneously concluded that the applicant in these proceedings did not satisfy Public Interest Criterion 4020 even though the evidence before the Tribunal established that the applicant was entirely innocent, and that the responsibility for the creation of the bogus document and the submission of that document to the Department was solely attributable to the misconduct of a third party, being the applicant's brother-in-law.

52 52 Given the brevity of the primary judge's reasons for rejecting both judicial review grounds, it is convenient to set them out in full:

Ground 1

13. Mr Arch, the solicitor on behalf of the applicant sought to submit that the finding that the document was fraudulent, been altered, or it was fraudulent and caused to be given to the Minister or an officer of the Department by an applicant was not open and was wrong because the brother-in-law had admitted that he had done it in some moment of vindictiveness to cause the applicant harm.
14. The Tribunal raised with the applicant in the witness box as did the with Mr Arch, the solicitor for the applicant, how it could be that the brother-in-law in this moment of vindictiveness could have improved the score so as to permit the applicant to pass the test.
15. Mr Arch, the solicitor for the applicant, pursued the argument maintaining that there was no evidence to support the finding that the applicant had given or caused to be given the document to the relevant person in relation to the Public Interest Criterion 4020.
16. The Tribunal's reasons clearly took into account the brother-in-law's explanation and the explanation advanced of the employer's husband seeking to be vindictive and identified that the vindictiveness went to improve the score so that the applicant actually passed the test. The adverse findings by the Tribunal were clearly open and cannot be said to lack an evident and intelligible justification. No jurisdictional error as alleged in ground 1 is made out.

Ground 2

17. Ground 2 in substance seeks to invite this Court to engage in an impermissible merits review. The adverse finding by the Tribunal was open in relation to finding that the applicant did not meet the requirements of cl.4020(1) of Schedule 4 to the Regulations, and it was open to the Tribunal to find that the circumstances were not ones which met the criteria of cl.4020(4) of Schedule 2 to the Regulations.
18. The applicant's solicitor's focus on the purpose of the person undermining the applicant's visa application or otherwise damaging the applicant's legal rights is an odd submission to advance in circumstances where the interference was one to assist the applicant improve his score so that he could meet a criteria he otherwise failed to meet. There is no substance in ground 2. No jurisdictional error as alleged in ground 2 is made out.

Conclusion

19. No jurisdictional error is made out by the application. Accordingly, the application is dismissed.

THE APPEAL

53 53 The notice of appeal as filed raised two grounds as follows (without alteration):

Grounds of appeal

1. The primary judge erred in holding that the decision of the Administrative Appeals Tribunal was not affected by jurisdictional error by reason of the Tribunal's misinterpretation of Public Interest Criterion of *Schedule 4* of the

Migration Regulations 1994.

Particulars

1. The Tribunal erred in finding that the appellant had "given, or caused to be given" to the Minister or an officer of the Department a bogus document within the meaning of Public Interest Criterion 4020 of *Schedule 4 of the Migration Regulations*, namely an allegedly altered or fraudulent IELTS test result report in circumstances where:
 - (a) The evidence before the Tribunal established that the IELTS test result report was altered by the applicant's brother-in-law, without the applicant's knowledge, participation or consent.
 - (b) The evidence before the Tribunal established that the appellant's brother-in-law was solely responsible for transmitting the fraudulent IELTS test result report to a migration agent for the purpose of lodging the document with the Department of Immigration and Border Protection.
 - (c) The evidence before the Tribunal established that the appellant did not have any direct contact with the migration agent in relation to the application.
2. The primary judge erred in holding that the decision of the Administrative Appeals Tribunal was not affected by jurisdictional error by reason of the Tribunal's conclusion that Public Interest Criterion 4020 may be engaged in circumstances where a third party creates a bogus document and arranges for that bogus document to be given to the Department, without the knowledge, participation or consent of the applicant and where the third party engages in such conduct with the specific purpose of undermining the applicant's visa application or otherwise damaging the applicant's legal rights.

Particulars

1. The Tribunal erroneously concluded that Public Interest Criterion 4020 may be interpreted so as to impose absolute liability on an applicant whenever a bogus document is submitted to the Department, notwithstanding the supervening conduct of a third party acting with the purpose of causing a visa application to be refused.
2. The Tribunal erroneously concluded that the appellant did not satisfy Public Interest Criterion 4020 even though the evidence before the Tribunal established that the applicant was entirely innocent, and that the responsibility for the creation of the bogus document and the submission of that document to the Department was solely attributable to the misconduct of a third party, being the applicant's brother-in-law.

54 54 In his notice of appeal, the appellant sought to have orders 1 and 2 of the FCCA set aside and in substitution thereof, orders that:

- (4) (1) the AAT's decision dated 16 February 2017 be set aside;
- (5) (2) the matter be remitted to the AAT to be determined in accordance with law;
and
- (6) (3) the Minister pay the appellant's costs of the application in the FCCA.

(a) The application for leave to raise a new ground on appeal

55 55 Several days before the hearing of the appeal, the Court invited the parties to address it on the relevance, if any, of the Full Court's decisions in *Gill v Minister for Immigration and Border Protection* [2016] FCAFC 142; 248 FCR 398 (***Gill***) per Kenny, Griffiths and Mortimer JJ and *Singh v Minister for Immigration and Border Protection* [2016] FCAFC 141; 247 FCR 554 (***Singh 2016***) per Kenny, Griffiths and Mortimer JJ. Neither of the parties had referred to these decisions in their respective outlines of written submissions. Subsequently, at the outset of the hearing, the Court drew the parties' attention to another more recent decision of the Full Court in *Maharjan v Minister for Immigration and Border Protection* [2017] FCAFC 213 (***Maharjan***) per Gilmour, Logan and Mortimer JJ (it should be noted that the Minister filed an application for special leave to appeal to the High Court against this judgment on 15 January 2018). After a brief adjournment to enable the appellant's solicitor to read *Maharjan*, an application was made for leave to amend the notice of appeal so as to add the following new ground of appeal, which is based upon the ground of appeal which was ultimately upheld by a majority of the Full Court in *Maharjan* (Gilmour and Mortimer JJ):

3. The Federal Circuit Court erred by not deciding the jurisdictional fact of whether fraud had invalidated the visa application or the visa application process.

56 56 Mr Reilly, who appeared for the Minister both below and on the appeal, was instructed to oppose the application for leave. After hearing the submissions of both parties, the Court ruled that leave would not be granted. It indicated that reasons for this ruling would be given later. Those reasons now follow.

57 57 The principles which guide the exercise of the Court's power to permit a ground to be raised on appeal for the first time are relatively well settled. Many of them are summarised in *Murad v Assistant Minister for Immigration and Border Protection* [2017] FCAFC 73; 250 FCR 510 at [19]-[20] per Griffiths and Perry JJ:

- 19 The general principles guiding the decision whether or not to permit a ground to be raised on appeal which was not run below are well settled. They are reflected in the following observations of the Full Court in *VUAX v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 158; 238 FCR 588 at [46]-[48] (and which were recently reaffirmed in substance by Flick and Rangiah JJ in *Sun v Minister for Immigration and Border Protection* [2016] FCAFC 52; 243 FCR 220 at [89]-[90]):

- 46 In our view, the application for leave to rely upon the sole ground of appeal now raised should be refused. Leave to argue a ground of

appeal not raised before the primary judge should only be granted if it is expedient in the interests of justice to do so: *O'Brien v Komesaroff* (1982) 150 CLR 310; *H v Minister for Immigration & Multicultural Affairs*; and *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424 at [20]-[24] and [38].

- 47 In *Coulton v Holcombe* (1986) 162 CLR 1, Gibbs CJ, Wilson, Brennan and Dawson JJ observed, in their joint judgment, at 7:

“It is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial. If it were not so the main arena for the settlement of disputes would move from the court of first instance to the appellate court, tending to reduce the proceedings in the former court to little more than a preliminary skirmish.”

- 48 The practice of raising arguments for the first time before the Full Court has been particularly prevalent in appeals relating to migration matters. The Court may grant leave if some point that was not taken below, but which clearly has merit, is advanced, and there is no real prejudice to the respondent in permitting it to be agitated. Where, however, there is no adequate explanation for the failure to take the point, and it seems to be of doubtful merit, leave should generally be refused. In our view, the proposed ground of appeal has no merit. There is no justification, therefore, for permitting it to be raised for the first time before this Court.

- 20 In *Summers v Repatriation Commission* [2015] FCAFC 36; 230 FCR 179, in discussing the relevant principles, the Full Court stated at [94] that, generally speaking, leave is more likely to be granted to permit a fresh issue to be raised on appeal where the new point turns only upon a question of construction or upon a point of law, or where the facts are not in controversy. A Full Court constituted by five Justices approved that passage in *Haritos v Commissioner of Taxation* [2015] FCAFC 92; 233 FCR 315 at [79].

- 58 58 As Gilmour and Mortimer JJ observed in *Maharjan* at [32]:

...The touchstone is always the interests of the administration of justice. Sometimes those interests will favour holding a litigant to her or his case at first instance, sometimes not.

- 59 59 Although the majority in *Maharjan* was prepared to grant leave to permit the appellant there to successfully run the same ground which the appellant here now seeks leave to run, for the following reasons we were not persuaded that leave should be granted in the particular circumstances here.

- 60 60 First, in contrast with the position in *Maharjan*, there was a lengthy delay in the appellant seeking to raise the new ground. As noted above, the application was only made during the course of the hearing and after the Court had drawn the parties' attention to cases such as *Gill, Singh 2016* and *Maharjan*. The decisions in *Gill* and *Singh 2016* were published well before the hearing below. At the time of the hearing below, the Full Court had reserved

its judgment in *Maharjan*, but that judgment was not delivered until after the primary judge published his judgment.

61 61 Secondly, Mr Arch confirmed that he had made a deliberate forensic decision not to run this ground in the proceedings below, notwithstanding that he was aware at that time of both *Gill* and *Singh 2016*. He explained that this forensic decision had been made in light of the evidentiary issues in the case. Accordingly, no challenge was made below to the validity of the visa application itself. Instead, the appellant simply challenged the AAT's decision as being vitiated by jurisdictional error. In circumstances where the appellant had legal representation below and a considered decision was made not to raise a particular ground of review, we consider that it would only be in exceptional circumstances that a party should be permitted to run that point on appeal.

62 62 Thirdly, it is important to consider whether the point which the appellant now wishes to raise for the first time on appeal could possibly have been met by calling evidence below. The importance of this consideration in determining whether or not to grant leave has been emphasised by the High Court in many cases, including *Park v Brothers* [2005] HCA 73; 222 ALR 421 at [34] per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ; *Water Board v Moustakas* [1988] HCA 12; 180 CLR 491 at 497 per Mason CJ, Wilson, Brennan and Dawson JJ; *Suttor v Gundowda Pty Ltd* [1950] HCA 35; 81 CLR 418 at 438 per Latham CJ, Williams and Fullagar JJ; *University of Wollongong v Metwally (No 2)* [1985] HCA 28; 59 ALJR 481 at 483 and *Coulton v Holcombe* [1986] HCA 33; 162 CLR 1 at 7-8 per Gibbs CJ, Wilson, Brennan and Dawson JJ. Mr Arch properly and candidly acknowledged that if proposed ground 3 had been raised below so as to add a challenge to the validity of the visa application, it could have affected the evidence in the FCCA. Mr Reilly confirmed that the Minister may have wished to adduce evidence in response and to cross-examine any witnesses called by the appellant in support of this ground if it had been run below.

63 63 In our view, these matters are fatal to the application for leave and, for these reasons, leave was refused.

64 64 We will now address grounds 1 and 2 of the notice of appeal, which broadly reflect the grounds of judicial review run unsuccessfully below.

(b) The parties' submissions summarised

65 65 As to ground 1 of the appeal, the appellant challenged the correctness of the AAT's finding at [22] of its reasons for decision that the appellant had "given or caused to be given to the Minister...a bogus document or information that is false or misleading in a material particular in relation to the application for the visa". He contended that this finding was "altogether without foundation and was therefore affected by jurisdictional error". The appellant contended that this was because there was no evidence before the AAT which was capable of supporting that finding. To the contrary, the appellant submitted that the AAT's factual record established that he had played "no role whatsoever in giving the document to the Department, or in causing it to be given to the Department".

66 66 After referring to the evidence before the AAT concerning the brother-in-law's role in producing the false document and giving it to the migration agent to forward to the Department without the appellant's knowledge, the appellant submitted that the "facts" established that he was "wholly uninvolved in the production of the counterfeit test result report, and that he was unaware both that the fraudulent document had been produced by his brother-in-law and that his brother-in-law had sent the report to the migration agent for filing with the Department".

67 67 The appellant also submitted that there was no evidence before the AAT that the appellant had given his brother-in-law any authority to do what he did, thus there was no evidence of any "causal connection" between the appellant and his brother-in-law's conduct.

68 68 The appellant submitted that his brother-in-law's conduct should be regarded as the equivalent of a "*novus actus interveniens*", which conduct was undertaken for the purpose of damaging and subverting the appellant's visa application.

69 69 Having regard to these matters, the appellant submitted that the AAT's conclusion that he had given or caused to be given to the Department the fraudulent IELTS report was without "any logical or probative basis", citing *Minister for Immigration and Multicultural Affairs v Eshetu* [1999] HCA 21; 197 CLR 611; *CQG15 v Minister for Immigration and Border Protection* [2016] FCAFC 146; and *SZLGP v Minister for Immigration and Citizenship* [2008] FCA 1198.

70 70 The appellant also complained that the primary judge failed to engage with his claim that there was no evidence to support the AAT's factual finding that the appellant had "given, or caused to be given" the fraudulent document to the Department.

71 71 In support of ground 2 of the appeal, the appellant submitted that cases which have examined PIC 4020 do not stand for the proposition that it should be interpreted in "a strict, absolute and unqualified way to disqualify an applicant whenever a 'bogus document' is submitted with a visa application, and without regard to the source or provenance of the document". Reference was made to *Trivedi* and the exceptions drawn there for matters that are "innocent, unintended or accidental". While accepting that the facts here were different from those in *Trivedi*, the appellant relied upon Buchanan J's recognition in *Trivedi* at [32] and [41] that completely "innocent mistakes" would not be caught by PIC 4020. The appellant submitted that a similar exception should be made in this case where he was "entirely innocent in respect of the fraud that was perpetrated by his brother-in-law" and which was intended to defeat a fair assessment of his visa application.

72 72 The appellant submitted that recognising his case as falling within an exception to PIC 4020 would preserve and enhance the integrity of the visa application process. That is because such an exception would operate to preserve the rights of visa applicants to a "full and fair assessment of their applications on the merits, and would protect the application assessment process from interference by persons acting with malign motive against applicants".

73 73 The appellant submitted that his case was analogous to *SZFDE v Minister for Immigration and Citizenship* [2007] HCA 35; 232 CLR 189 (***SZFDE***) because the brother-in-law's fraudulent conduct had had the effect of "stultifying" the fair and just review of the appellant's visa application, both by the Department and by the AAT.

74 74 In response, the Minister submitted that it was significant that there was no finding by the AAT that the appellant was "entirely innocent" in what had occurred. This was because the AAT did not find it necessary to make a finding on that matter. Rather, the AAT found that the IELTS result form had been altered by "someone".

75 75 As to the claim that the AAT had misinterpreted PIC 4020, the Minister said that this ground must fail because of s 98 of the *Act*, which operated to deem the appellant to have filled in his visa application notwithstanding that it was in fact filled in by his migration

agent. It was submitted that this approach is consistent with *Trivedi, Patel v Minister for Immigration and Border Protection* [2015] FCAFC 22 (**Patel**) and *Zhang v Minister for Immigration and Border Protection* [2016] FCA 921 (**Zhang**). The Minister emphasised that in each of those three cases, the visa applicant claimed to be unaware that a false statement had been submitted to the delegate ostensibly on their behalf. He submitted that, as held in *Zhang* at [68], cases such as *Trivedi* and *Patel* are not distinguishable simply because the appellant here claimed that his brother-in-law submitted the bogus document without his knowledge.

76 76 As to ground 2 of the appeal, the Minister contended that it was inconsistent with *Trivedi* at [43] and [49], where it was held that it did not matter that the appellant claimed to be unaware of the bogus document or not complicit in its creation. Moreover, the Minister submitted that no analogy should be drawn between “innocent mistakes or accidents” and the conduct which was the subject of findings made by the AAT here.

77 77 At the end of the hearing, the parties were invited to provide supplementary submissions addressing any relevant case law on the meaning of the phrase “has given, or caused to be given”. Both responded saying that they could find no such case law.

(c) Analysis of some relevant case law

78 78 The proper construction and application of PIC 4020 has been considered in several decisions of both the Full Court and at first instance. It is convenient to say something more about some of those authorities before applying the relevant principles to the particular circumstances here. At the outset, it is important to emphasise the need to pay close attention to the facts in each of these cases as found by the tribunal whose decision was subsequently challenged on judicial review, as well as to how those cases were run. In particular, it is evident that different principles can apply in cases where a visa applicant contends that his or her visa application was invalid because of fraud, as opposed to a contention that there has been a misconstruction or misapplication of PIC 4020.

(i) Trivedi

79 79 *Trivedi* concerned PIC 4020 as in force from 2 April 2011 and which was in substantially similar terms when the AAT made its decision in the present proceeding. *Trivedi* also concerned the definition of “bogus document” as it then appeared in s 97 of the

Act. That definition is in identical terms to those which appeared in s 5(1) of the *Act* at the time of the AAT's decision in the present proceeding.

80 80 In *Trivedi*, a bogus IELTS test score was provided by the visa applicant. The Department asked the visa applicant for an explanation. Her solicitor and migration agent responded by providing a new and later IELTS test result which showed that the visa applicant had subsequently reached the appropriate standard of English competency. The visa applicant was again asked to explain the earlier bogus document. Her migration agent replied and said that she had been misguided by various "agents" in India, who had altered her first test result without her knowledge or approval.

81 81 The Minister urged the Court in *Trivedi* to adopt the same construction of PIC 4020 as had Driver FM in *Vyas v Minister for Immigration and Citizenship* [2012] FMCA 92; 263 FLR 131 (*Vyas*). In *Vyas*, Driver FM adopted the following construction of PIC 4020 at [65] (emphasis added):

65. ... Its purpose is not penal or quasi-penal. Rather, it seeks to ensure that an applicant for a visa truly fulfils the criteria for the visa. The provision of a document that is bogus or false or misleading information would, left unchecked, enable a person who falls short of visa criteria nonetheless to be granted a visa. In this respect, **it does not matter whether the document is provided by the applicant knowingly or unwittingly. Either way, a prohibition on the provision of relevantly defective documents is required. Otherwise, undeserving applicants could receive a visa.**

82 82 In *Trivedi*, Buchanan J (with whom Allsop CJ and Rangiah J agreed), emphasised the importance of the context in which PIC 4020 was introduced in the *Regulations* (which relevantly took effect from 2 April 2011). Justice Buchanan noted at [36] that, at that time, the *Act* contained a series of provisions in Pt 2, Div 3, Subdiv C which required visa applicants and non-citizens entering Australia to provide correct information in visa applications and on passenger cards. The effect of those provisions was that bogus documents were not to be given, and incorrect answers or information were required to be promptly corrected. Section 103 of the *Act* was directed to the subject of bogus documents. It provided:

103 Bogus documents not to be given etc.

A non-citizen must not give, present or provide to an officer, an authorised system, the Minister, or a tribunal performing a function or purpose under this Act, a bogus document or cause such a document to be so given, presented or provided.

83 A similar form of s 103 existed at the time of the AAT's decision in the present proceedings. As Buchanan J noted in *Trivedi* at [36], these "obligations apply whether a person knows the information to be correct at the time or not", citing s 100 (which remained in force at the relevant time). His Honour also noted at [37] that it was explicitly provided in s 111 that breach of the requirements of Subdiv C might lead to cancellation of a visa, whether or not non-compliance was deliberate or inadvertent.

84 Justice Buchanan set out some extracts from the Explanatory Statement to the *Migration Amendment Regulations 2011 (No. 1)* (Cth), which introduced PIC 4020:

38 The Explanatory Statement issued with the *Migration Amendment Regulations 2011 (No. 1)* referred to those existing arrangements, saying:

Item [3] – Schedule 4, Part 1, after clause 4019

...

Sections 97 to 106 of the Act, in general, place obligations on applicants to provide correct information and to correct any incorrect information whether at the time of application or subsequently prior to visa grant. ...

39 The contrast between the reference to the existing provisions (correct/incorrect) and the language in new PIC 4020 (false or misleading) is obvious. One explanation given by the Explanatory Statement for the need for the new provisions was as follows:

Item [3] – Schedule 4, Part 1, after clause 4019

...

... Further, it is common practice that a visa applicant will seek to withdraw the bogus documents, or false or misleading information or find alternative methods of satisfying the relevant visa criteria without relying on the false information. In circumstances where this occurs, a decision maker is required to accept the request to withdraw the information and continue to process the application.

85 At [41] of *Trivedi*, Buchanan J rejected the Minister's contention that even completely innocent mistakes fell within PIC 4020. His Honour added at [43], however, that for PIC 4020 to apply, it was not necessary "to show knowing complicity by a visa applicant" because that would "impose an impossible task on those administering the visa system". Nevertheless, it was "necessary that the information or document have the necessary quality of purposeful falsity, whether or not the visa applicant can be shown to have knowledge of that fact". Justice Buchanan made clear that PIC 4020 is not directed to "innocent, unintended or accidental matters" (at [32]).

86 86 Justice Buchanan had acknowledged at [27] that he accepted the “basic premise” stated in *Vyas*, that the visa applicant need not be complicit in any falsehood. His Honour added at [44], however, that PIC 4020 should not be construed as it was in *Vyas* (which presumably is a reference to the inference there that PIC 4020 applied even to innocent errors or mistakes). At [44], Buchanan J said that, on the facts found by the Migration Review Tribunal (MRT), “... the IELTS test result form submitted by the [visa applicant] with the visa application contained information which was false or misleading in the requisite sense. It was, in truth, a bogus document”.

87 87 Justice Buchanan made the following relevant and important observations at [49] and [50] (emphasis added):

49 For the reasons I have already given, it should be accepted that PIC 4020 is directed to information or documents which are purposely untrue. **It seems to me to be clear from the same analysis that the purpose of PIC 4020 was to render visa applicants ultimately responsible for the veracity of the information and documents supplied to support the application.** Although the limited terms of the waiver (and therefore any discretion to excuse non-compliance) make it apparent that innocent errors are not the focus of attention, **it is equally clear that PIC 4020 is directed at the overall integrity of the visa system and as a bulwark against deception and fraud from any quarter associated with a visa applicant. It is not inconsistent with a coherent public policy to make a visa applicant ultimately responsible for purposely untrue material provided with a visa application. It would be an intolerable burden on the administration of the visa system to require that those assessing visa applications not only discover that information or documents are false in a material particular, but also that the visa applicant who provided them knew them to be so. In many cases that would be impossible and would defeat the apparent intent of the provision.**

50 There was no doubt in the present case (and in *Vyas*) that the IELTS test result form provided by the first appellant contained false information. It was clearly open to the MRT, on the other facts found by it, to conclude that it was bogus. It was a counterfeit. It was not the real thing. The fact that a formal declaration to that effect was not made in the present case does not alter the character of the document, or the information it contained. **It was also open to the MRT to find, as it did, that the information thereby given by the first appellant was false or misleading in a material particular. It was not necessary to prove that the first appellant knew the contents of the document were false or misleading when she proffered it.**

88 88 In the present appeal, the Minister sought to defend the primary judge’s decision concerning the meaning and application of PIC 4020 as being consistent not only with *Trivedi*, but also with two subsequent decisions, namely *Patel* per Edmonds, Buchanan and Flick JJ and *Zhang* per Griffiths J.

(ii) *Patel*

89 89 In *Patel*, the appellant provided an IELTS test report form with her application for a visa which was inconsistent with the test results available on the IELTS online verification system. The appellant's central contention in *Patel* was that she was not responsible for any alteration or forgery of the document which she supplied to the Department and that there was insufficient evidence upon which the MRT could have concluded that the document was a "bogus document" within the definition of that expression which was then in s 97 of the *Act*.

90 90 After the FCCA rejected her judicial review application, the appellant appealed to the Full Court. She claimed that the primary judge had erred in finding that the MRT had correctly construed and applied PIC 4020. She claimed that the primary judge should have found that the MRT erred in failing to appreciate "the requirements of evidence or information necessary before PIC 4020 could be invoked". The appellant also contended that the FCCA erred in not accepting her argument that the MRT should have made its own further inquiries as to the circumstances in which the bogus document was created, including as to whether the factually incorrect test results were the product of an honest mistake in transcription.

91 91 In *Patel*, Buchanan and Flick JJ gave separate reasons for judgment in dismissing the appeal. Justice Edmonds agreed with the reasons of both Buchanan and Flick JJ.

92 92 In response to the appellant's contention that she was not responsible for any alteration or forgery of the document which she provided to the Department, Buchanan J held that, as the MRT had appreciated, this was not the correct test. His Honour rejected the appellant's submission that the MRT's approach was inconsistent with *Trivedi*. His Honour stated at [19] that the MRT had given direct consideration to whether the document was a bogus document within the statutory definition and whether PIC 4020 was engaged, and that there was no error in the MRT's analysis. Justice Buchanan also rejected the appellant's contentions concerning the obligation of the MRT to make its own further inquiries.

93 93 In his separate reasons for judgment, Flick J addressed the appellant's contention that, notwithstanding *Trivedi*, there was no evidence that the IELTS test results had been "deliberately falsified" and, although they were factually incorrect, that may have been "the product of an honest mistake in transcription" (at [34]). The appellant contended in the alternative that the error may have been caused by those who issued the original form to her.

Justice Flick held that, in the absence of any challenge to the integrity of the online verification results, it was open to both the delegate and the MRT to find that the document provided by the appellant had been deliberately changed. Moreover, his Honour added at [35] that it was open to the delegate and the MRT to conclude that it was the appellant who had “to bear responsibility for those changes”. It is evident that his Honour had in mind the approach established in *Trivedi* when he made those remarks. Flick J concluded at [37] that, given the limited facts presented to the MRT by the appellant, the MRT’s conclusion that the document was a bogus document was a conclusion which was readily open to it.

(iii) *Zhang*

Zhang is another case in which an IELTS test report was found by both the delegate and the MRT to be a bogus document. The photograph on the IELTS online verification system of the person who sat the test did not match the photograph on the test report form provided to the Department in support of the appellant’s visa application. When this discrepancy was brought to the appellant’s attention, he claimed that he had met a man named “Kevin” who claimed to be a senior migration agent and offered to assist him with his visa application. He said that he gave his IELTS test results to Kevin and that Kevin subsequently provided him with a letter from the Department acknowledging receipt of his visa application. He said that he had had no further contact with Kevin and was shocked to be told by the Department that his IELTS test results were bogus. Both the delegate and the then MRT found that the appellant did not meet PIC 4020 and that the requirements of that provision applied whether or not the visa applicant was aware that the document was a bogus document.

This approach was upheld by the FCCA (see *Zhang v Minister for Immigration and Border Protection* [2016] FCCA 183), relying upon both *Trivedi* and *Patel*. With direct reference to the judicial review applicant’s contention, relying on *SZFDE*, that Kevin had acted fraudulently and that this fraud affected the MRT’s decision, the primary judge did not accept that those concepts had any relevance to PIC 4020. The primary judge cited *Trivedi* as supporting his view that the visa applicant was responsible for the veracity of the information and documents supplied in support of his or her visa application and there was no requirement of knowing complicity by a visa applicant where material which is purposely untrue has been provided. The primary judge also added in *obiter* observations that the judicial review applicant’s claims that Kevin had acted fraudulently were no more than

“assertions” which were not able to be tested in cross-examination because the judicial review applicant did not give evidence in the FCCA.

97 97 In the appeal to this Court in *Zhang*, the appellant contended that the primary judge below had erred in not distinguishing *Trivedi* and *Patel* on the basis that he was a victim of fraud and there should have been a finding that he was not responsible for the bogus document. It is important to note the following observations in *Zhang* at [39] where, after noting that PIC 4020 did not arise in *SZFDE*, the Court said:

39 There have been numerous subsequent cases involving claims of fraud on the part of an agent. A sample of those cases, as discussed below, illustrates the diversity of factual circumstances in which the issue of fraud can arise in a migration law context. When that issue does arise, it can arise in the context of different migration legislative provisions, including but by no means limited to PIC 4020 and careful consideration needs to be given to the interaction between the terms of the relevant provision and any findings of fraudulent conduct and complicity.

98 98 The original grounds in the judicial review application in *Zhang* did not raise any allegation that Kevin had committed a fraud on either the appellant or the Department. On the appeal, the appellant sought to raise two new grounds which had not been run below. The first was that the FCCA should have found that the MRT erred in failing to find that Kevin had acted outside the scope of his agency in submitting a fraudulent form to the Department without the appellant’s knowledge or consent. The other was a contention that the FCCA erred in failing to find that *Trivedi* and *Patel* did not apply where a fraud had been perpetrated on the appellant and the Department, which involved a misconstruction of PIC 4020. Leave was refused to raise the two new grounds on the basis that the Minister did not have an opportunity to adduce relevant evidence in the FCCA. Reference was also made in [63] of *Zhang* to the fact that the appellant’s affidavit in the FCCA was silent on the question of the appellant’s knowledge of, or complicity in, Kevin’s conduct.

99 99 As noted in *Zhang* at [62], the MRT in that case had found it unnecessary to make any findings concerning the appellant’s claims that he was an innocent victim and did not know what Kevin had done. This was because of the MRT’s view that PIC 4020 applied whether or not a bogus document is provided by or on behalf of a visa applicant knowingly or willingly. The Court observed at [63] that this aspect of the MRT’s decision was not challenged in either of the judicial review grounds run below.

100 In rejecting the appellant's contention in *Zhang* that the FCCA had erred in not distinguishing *Trivedi* and *Patel*, the Court said at [67] that the contention was predicated on a false premise, "namely that the Tribunal accepted that the appellant was unaware that Kevin had submitted a fraudulent document". In fact the MRT had made no such finding. The Court added at [68] that, in any event, *Trivedi* was not distinguishable on the basis of the appellant's alleged unawareness of what Kevin had done because his knowledge of the fraudulent conduct of his migration agent was not material to the operation of PIC 4020, as was held in both *Trivedi* and *Patel*.

101 Finally, it was expressly noted in *Zhang* at [69] that the appellant did not claim that the visa application itself was a nullity because of fraud, in contrast with cases such as *Prodduturi v Minister for Immigration and Border Protection* [2015] FCAFC 5; 144 ALD 243 (*Prodduturi*) and *Singh v Minister for Immigration and Border Protection* [2015] FCAFC 151 (which is summarised at [56]-[59] of *Zhang*). Rather, the relief sought by the appellant both on the appeal and in the FCCA relied upon his visa application being a valid application (i.e. the same as here).

(iv) *Prodduturi*

102 The next relevant Full Court authority is *Prodduturi* per Perram, Perry and Gleeson JJ. The appellant claimed there that his migration agent had prepared his visa application and engaged in fraud because the agent fabricated a written skills assessment. The appellant sought to establish that his visa application was invalid. He readily accepted that he was ineligible for the visa for which his agent had applied. His concern was that, because of the fraud, he was prohibited by PIC 4020(2) from applying for another visa for three years (see also s 48 of the *Act*).

103 As the plurality (Perram and Perry JJ) made clear at [14] of *Prodduturi*, there apparently was no dispute in the FCCA that the false statement in the visa application had been made by the migration agent and without the appellant's actual knowledge. The MRT had found that the visa applicant knew that the migration agent was going to make the visa application and while the visa applicant did not know of the false statement regarding the skills assessment, this was because the appellant was indifferent to the contents of the visa application. Based on these findings, the Tribunal concluded that the visa applicant was responsible for the misleading statement even if he lacked actual knowledge of it.

104 In the FCCA, however, it was found that the visa applicant had not proved that the migration agent had acted fraudulently and that, since he carried the onus of proof, his case was not made out.

105 *Prodduturi* involved a complex procedural history. As the plurality noted at [18], it was not until the matter came before the FCCA that the visa applicant contended that the MRT lacked jurisdiction to entertain the review because of the migration agent's fraud. Accordingly, as the plurality noted at [18], this had the procedural consequence that, on the issue of whether or not there had been fraud, the FCCA had to come to its own view because the alleged fraud involved a jurisdictional fact. Even though the Tribunal had accepted that the migration agent was the origin of the misleading statement, the plurality said that this did not bind the FCCA to come to the same conclusion.

106 The primary judge in the FCCA had concluded at [31] of his Honour's reasons for judgment that he was not satisfied that the visa applicant had established that the migration agent had acted fraudulently.

107 The plurality found that the primary judge's finding, that fraud by the agent had not been established, was made in error because it was not disputed by the parties in the FCCA that the migration agent had acted fraudulently. Justices Perram and Perry JJ said at [21]:

21 Paragraph 31 involved a finding that the appellant had failed to prove something which was not in dispute. Indeed, not only was the falsity of the agent's actions not in dispute it was the subject of uncontradicted evidence. The only evidence on the issue before the Court consisted of the delegate's decision (which was neutral on the issue), the appellant's evidence before the Tribunal which asserted the fraud of the migration agent and his ignorance of that fraud, the decision of the Tribunal likewise accepting that the agent had acted dishonestly and the Tribunal's finding as to the appellant's indifference to the manner in which his visa application was dealt with. That the Minister did not seek to suggest that the migration agent had not made the false statement was simply a recognition that any other finding would have lacked an evidential basis.

108 Further, the plurality found that while it was not feasible to disentangle the FCCA's decision that the visa applicant had not demonstrated fraud by his migration agent from its conclusion about what the visa applicant did or did not know about the visa application, the reasoning of the FCCA on these two topics was internally inconsistent (see *Prodduturi* at [26]-[27] per Perram and Perry JJ).

109 Although Gleeson J agreed with the orders proposed by Perram and Perry JJ and with their Honours' reasons generally, her Honour was not persuaded that [31] of the FCCA's

reasons for judgment revealed any misunderstanding on the primary judge's part as to the issue for resolution.

110 110 As to whether the FCCA erred in finding that the visa applicant was responsible for his migration agent's fraud, the Full Court in *Prodduturi* declined to deal with this issue because, subject to the question of utility, there would have needed to have been a retrial on the issue of what the visa applicant knew about the visa application. In these circumstances, the Full Court declined to express any views on this issue because it did not know what the true facts were (see *Prodduturi* at [29] per Perram and Perry JJ).

111 111 Notwithstanding that the Full Court held in *Prodduturi* that the FCCA had erred in the way described above, it declined to grant any relief on the basis of lack of utility. That was because of the Court's view that neither the FCCA nor the Federal Court on appeal had jurisdiction to set aside the delegate's visa refusal decision and that, absent such an order, the delegate's decision to refuse to grant the visa would still stand.

(v) *Arora*

112 112 The next relevant Full Court decision is *Arora v Minister for Immigration and Border Protection* [2016] FCAFC 35; 238 FCR 153 (*Arora*). The Full Court determined two appeals, one by Mr Arora and the other by a Mr Singh. In Mr Arora's case, he lodged an application for a Skilled (Residence) (Class VB, subclass 886) Visa. In support of his application, he provided a letter which certified his qualifications for the occupation of pastry cook. The evidence revealed that Mr Arora procured the skills assessment letter after he provided to the skills assessment body a letter which suggested that he had done 900 hours of work experience at a particular cake shop. The evidence revealed that a third party had issued false letters of reference from this cake shop. There was another deficiency with the skills assessment which is not relevant to the present appeal.

113 113 The Full Court noted at [12] that there was no challenge in the FCCA below to the finding by the MRT that the skills assessment letter was a bogus document and was provided to the Department with Mr Arora's visa application. At [11] the Full Court referred to *Trivedi* in support of its finding that the skills assessment letter was a bogus document because it was based on false or misleading statements in the reference purportedly from the cake shop, "and that is so even if Mr Arora did not know that the cake shop reference was false".

At [15], and reflecting the submissions made in Mr Arora's case, the Full Court said that, properly construed, PIC 4020(1) did not require the falsity of a bogus document to be relevant to the particular criteria relating to a visa. That issue does not arise in the present appeal.

The facts in Mr Singh's appeal (which, as noted above, was heard at the same time as that of Mr Arora's) were substantially similar and the Full Court rejected the appeal for similar reasons to those relating to Mr Arora's appeal.

(vi) *Gill*

The next two Full Court decisions are *Gill* and *Singh 2016*, which appeals were heard together. As will shortly emerge, both cases involved attempts by the respective appellants to avoid the operation of s 48 of the *Act* and/or PIC 4020(2) and the limitations those provisions placed on the respective appellant's ability to make a fresh visa application in Australia. In both cases, the appellants contended that their original visa applications were a nullity because of fraud.

In *Gill*, the Minister acknowledged that s 98 of the *Act* (the terms of which are set out in [43] above) did not apply where a migration agent perpetrated a fraud on a visa applicant. The Full Court noted at [50] that the Minister's acknowledgement "was properly given".

The Full Court held that mere "indifference" of a visa applicant to an agent's conduct and the "general authority" given to the agent are not sufficient bases to attribute the visa applicant with responsibility for the migration agent's fraudulent conduct. Merely because a person retains a migration agent to apply for a visa but leaves it to the agent to do the work is not sufficient to constitute "indifference" to subsequent fraudulent conduct unless the indifference extends to the migration agent engaging in fraudulent or dishonest conduct to achieve the grant of a visa.

Reference is made at [46] of *Gill* to an earlier Full Court decision in *SZSXT v Minister for Immigration and Border Protection* [2014] FCAFC 40; 222 FCR 73 (*SZSXT*) per Perram, Robertson and Griffiths JJ. Some important relevant principles concerning fraud in a public law context were summarised in *SZSXT* at [51] (the cross-references are to the High Court's decision in *SZFDE*):

- (a) in the framework of general legal principle, fraud can come in various guises and is "infinite in variety" [8];

- (b) different considerations may arise when fraud is alleged in a public law case, which involves the due administration of Commonwealth laws and has an important constitutional underpinning in Ch III of the Constitution [11];
- (c) “fraud” can attract different meanings in private and public law and in the latter context has been used in a broad sense which encompasses “bad faith” [17];
- (d) in a case seeking certiorari based on the fraud of a third party, there is no requirement that one of the parties to the litigation be privy to the fraud [20];
- (e) another practical aspect of fraud in public law which may set it apart from fraud in civil law is that “often a victim of it will have no useful remedy except to have the fraudulently affected result set aside and a fresh untainted hearing conducted” [22];
- (f) in a public law case, fraud is not limited to that of a decision-maker, a party or a party’s representative [25]-[27]; and
- (g) there was no necessity in *SZFDE* to determine at large and in generally applicable terms the scope for judicial review for “third party fraud” of an earlier administrative decision where the judicial review applicant did not collude in the fraud and was not aware of it at the time [28]. But in the particular circumstances in *SZFDE* the rogue’s fraudulent dealings with the family had the effect of disabling the Tribunal from duly discharging its imperative statutory functions in conducting a review, such that there had also been a fraud “on” the Tribunal which meant that the Tribunal’s jurisdiction remained constructively unexercised [51]-[52].

120 120 In *Gill* at [47] the Full Court said:

- 47 The first and last of those principles from *SZFDE* have particular relevance in this appeal. Recognition that fraud can arise in a wide range of factual circumstances, such that it is apt to describe the range as “infinite in variety”, highlights the undesirability of prescribing in generally applicable terms the scope for judicial review where there is third party fraud. It is critical to pay close attention to both the particular facts and circumstances in which the issue of fraud arises and also to the terms of any specific legislative provision which may be affected by the fraudulent conduct of a third party, such as a migration agent.

121 121 At [50] of *Gill*, the Full Court accepted that the operation of PIC 4020 and related provisions in the *Act* can be affected by the fraudulent conduct of a migration agent in circumstances where the visa applicant has not colluded in that fraud and there is no evidence that the visa applicant was indifferent to whether the agent used unlawful or dishonest means.

122 122 A significant relevant feature of *Gill* is the Full Court’s emphasis on the distinction between a judicial review challenge in the FCCA, where it is claimed that there is a jurisdictional fact which the FCCA has to decide for itself on the basis of all the evidence before it (i.e. where there is a claim that there is no valid application for a visa), and a judicial review case involving a claim of jurisdictional error in the Tribunal’s fact finding (see *Gill* at

[59] and [60]). It was on the basis of this distinction that the Full Court distinguished the judgment of the FCCA in *Sran v Minister for Immigration and Citizenship* [2014] FCCA 37 (*Sran*). It might be noted that *Sran* was one of the cases referred to by the AAT in the present proceeding, along with *Trivedi* and *Vyas*. The Full Court explained in *Gill* that *Sran* was distinguishable because it was not decided on the basis of there being a jurisdictional fact which the Court had to decide for itself. The Full Court explained at [61] of *Gill*:

61 *Sran* is distinguishable in circumstances where, as noted above, the primary judge here expressly found that he was unable to make a positive conclusion that the appellant had colluded in his agent's fraud, but then proceeded on the erroneous basis that it was sufficient to find that the appellant was "indifferent" to what his agent did, without confronting the issue whether that indifference extended to whether or not the agent acted fraudulently or dishonestly. At [80] of *Sran*, the primary judge emphasised that the Tribunal had found that the visa applicant *Sran* was not "an innocent victim of criminal behaviour or a scam". That is to be contrasted with the more limited relevant findings made by the primary judge here. Those findings were insufficient to ground the dismissal of the appellant's application for judicial review.

123 Mr Arch may well have had these observations in mind in the present proceedings when he made a deliberate forensic decision to run the appellant's case in the FCCA below on the basis of jurisdictional error in the course of the AAT's reasoning and fact finding, as opposed to there being a jurisdictional fact with respect to the validity of the appellant's visa application itself. As noted above, the appellant's belated attempt in the present proceeding to raise a jurisdictional fact claim on the appeal was unsuccessful.

(vii) *Singh 2016*

124 In common with *Gill*, the appellant in *Singh 2016* was seeking to establish that, because of his migration agent's fraud, no valid visa application had been made by him, with the consequence that the restrictions on applying for another visa imposed by s 48 of the *Act* was inapplicable to him. The appellant's visa application in *Singh 2016* was made by the same migration agent as in *Gill* (and also in *Prodduturi*). The appellant in *Singh 2016* claimed that his migration agent had provided false and misleading information to the Department regarding the appellant's skills for his nominated skilled occupation as a solid plasterer.

125 The appellant in *Singh 2016* contended that *Prodduturi* was plainly wrong and should be overruled. Although the Full Court in *Singh 2016* concluded at [37] that one aspect of *Prodduturi* was clearly wrong (relating to the question whether there was a need to join the

delegate as a party to the proceedings where the Minister himself was a party), it was held that the reasoning in *Prodduturi* on the issue of jurisdiction was not clearly wrong.

126 126 However, *Prodduturi* was found to be distinguishable, primarily because the appellant there did not seek any declaratory relief concerning the validity of his visa application and this was important in understanding why the Full Court in *Prodduturi* ultimately found that there was a lack of utility in granting the relief which was sought. The Full Court in *Singh 2016* at [39] stated that *Prodduturi* had to be confined to its own particular circumstances.

127 127 In *Singh 2016*, the Full Court made the following relevant general observations at [51] and [52] regarding fraud in migration cases and the importance of the particular relief sought in a judicial review challenge which raises such an issue:

51 The issue of the operation of s 48 of the *Migration Act* where it is claimed that there has been fraud by a third party on a visa applicant, which fraud has affected the decision-making process in relation to that visa application, is a matter of real interest to both the appellant and the Minister. Furthermore, the issue is one which affects not only the appellant here, but also other visa holders whose visa applications are rejected in circumstances where there is fraud on the part of a migration agent or third party and the relevant statutory processes are also stultified. There is considerable public interest in the due and lawful administration of statutory provisions in the *Migration Act* relating to such matters as the making of visa applications and their determination and review in circumstances where there has been fraud on the part of a third party. As the High Court observed in *SZFDE* at [11], these concerns, which arise in a public law context, relate to the due administration of the laws of the Commonwealth and have important constitutional underpinnings.

52 Naturally, whether or not a Court exercising judicial review determines ultimately to grant appropriate declaratory relief will depend upon a range of matters. They include whether the evidence justifies the making of relevant and necessary findings of facts relating to such matters as the validity of the visa application, whether the visa applicant has been the victim of fraud and whether that fraud has also stultified some relevant aspect of the decision-making process in relation to the consideration of the visa application. None of these matters was addressed or determined by the FCCA below because of the erroneous finding that the Court lacked jurisdiction. For completeness, we accept the Minister's contention that, having regard to authorities such as *SZFDE* and *Minister for Immigration and Citizenship v SZLIX* [2008] FCAFC 17; 245 ALR 501 at [33] it will be necessary to find that the agent's conduct is not only a fraud on the visa applicant but must also stultify one or more aspects of the relevant statutory decision-making processes under the *Migration Act*.

128 128 The High Court refused the Minister's application for special leave in *Minister for Immigration and Border Protection v Singh* [2017] HCATrans 79, on the basis that the Full

Court's decision was not attended by sufficient doubt to warrant the grant of special leave to appeal. It appears that the issue upon which the Minister sought special leave related to the proper construction of s 476 of the *Act* and the ramifications of the fact that the FCCA's jurisdiction under that provision did not extend to a review of the decision of the primary decision-maker, and applied only in respect of the decision of the reviewing tribunal.

(viii) *Maharjan*

129 129 *Maharjan* is a further recent and relevant decision of the Full Court which needs to be considered. It is evident that the primary judge's attention was not drawn to this decision (nor to *Gill* or *Singh 2016*) notwithstanding that the Full Court reserved its decision in *Maharjan* on 8 August 2017, i.e. approximately one month before the FCCA heard the current proceeding, which was heard and determined on 11 September 2017. The Full Court's decision in *Maharjan* was published on 15 December 2017.

130 130 In *Maharjan*, the majority (Gilmour and Mortimer JJ) granted the appellant leave to rely upon a new ground of appeal, which ground was based on the Full Court's decisions in *Gill* and *Singh 2016*. Justice Logan dissented on the grant of leave. The majority then upheld the new ground of appeal.

131 131 The relevant fraud was said to have been committed by a third party and not the migration agent. In brief, the appellant had used a migration agent in Australia to lodge her application for a student visa. The application form required information concerning the visa applicant's access to sufficient funds to support her and her family unit for the total period of the proposed stay in Australia. Several supporting documents were provided to show that she had access to sufficient funds, including a bank statement from the Nabil Bank in Nepal which purported to show that the appellant's mother had sufficient bank account funds to meet her daughter's living and education expenses. The visa applicant was asked by the delegate to comment on information obtained by the Department which suggested that the bank statement was fraudulent. The apparent fraud related to the fact that, notwithstanding there was no challenge to the mother holding sufficient funds, the bank statement dated from August 2012, yet it was uncontested that the mother's bank account was not opened until December 2012.

132 132 The delegate found that the appellant did not satisfy PIC 4020 because the bank statement provided by the migration agent to the delegate was fraudulent. The delegate acknowledged that the Nabil Bank had verified that the funds were available in the mother's

account, but it found the bank statement which had been provided was not genuine because, as mentioned above, the statement dated from August 2012 and the account was not opened until December 2012.

133 133 The appellant sought a review of the delegate's decision in the AAT. She argued that the AAT should be satisfied that she met the requirements of PIC 4020 and that, if it was not so satisfied, the requirements in that provision should be waived.

134 134 The AAT affirmed the delegate's decision. It noted the appellant's claim that her mother had hired an agent in Nepal to arrange for the provision of the bank documents and that this agent had acted fraudulently and provided false documents.

135 135 As the majority noted at [22], the AAT made no findings of fact concerning the appellant's claim that she and her mother had been innocent victims of a fraud perpetrated by the Nepalese agent. Rather, the AAT proceeded on the same basis as occurred in the present proceeding, namely that PIC 4020 applied whether or not a bogus document or false or misleading information was provided by the visa applicant knowingly or unwittingly. The majority analysed *Gill* and *Singh 2016* at some length. Reference was also made to *SZFDE*, *Prodduturi* and *Trivedi*. At [50] of *Maharjan*, Justices Gilmour and Mortimer referred to the statement of principle in *Gill* at [47] (see [120] above). Their Honours then said at [53]:

53 This statement of principle recognises two matters. First, it is critical to establish whether the visa applicant colluded in the fraud or was, as the Full Court put it, "indifferent as to whether the agent used unlawful or dishonest means to be obtain a visa". Those concepts, of collusion and indifference, while applicable to the conduct of an Australian migration agent, are equally applicable to the conduct of any third party engaging in fraudulent conduct for the purposes of obtaining a visa for an applicant. At the level of general principle it is important to also repeat what the Full Court in *Gill* said at [52]: namely, that:

issues of fraud in a public law context were *sui generis* and are not to be equated with cases involving the creation and protection of personal and property rights in inter partes litigation where common law and/or equitable principles concerning fraud may arise for determination.

136 136 At [63], their Honours referred to [39] of *Singh 2016* and stated at [64] that the appellant sought to advance those principles in her appeal in *Maharjan*. At [67], Gilmour and Mortimer JJ observed that the *Act* "does not evince an intention that fraud by a third party on or against an 'innocent' visa applicant is to have no effect on the processes required by the Act, at least not where those processes are stultified by the fraud".

137 137 There is a detailed analysis of *Trivedi* by Gilmour and Mortimer JJ in *Maharjan* at [68]-[85]. Their Honours emphasised at [77] that the arguments raised in *Singh 2016* and *Gill* (as well as in the appeal in *Maharjan*) had not been raised in *Trivedi* and that that case was concerned only with the proper construction of PIC 4020. Their Honours observed at [78]:

78 Where third party fraud is raised, the visa applicant will bear an onus of proof on judicial review. That circumstance differs from a challenge to the lawfulness of a state of satisfaction formed about a visa criterion (PIC 4020). In our opinion, it is now quite clear from the decision of the High Court in *SZFDE*, the decision of the Full Court of this Court in *SZSXT* and the two decisions of the Full Court of this Court in *Gill* and *Singh* that declaratory relief of the kind sought by the appellants in this case is available in public law to an applicant who contends that she or he has been the (innocent) victim of such a fraud, and is able to show that third party fraud stultified a process or processes under the *Migration Act*.

138 138 It is important to note the distinction which was drawn by the majority between an allegation of fraud in a context which involves determining a jurisdictional fact concerning the validity of a visa application, and the construction and application of a provision such as PIC 4020. That distinction serves to highlight the difference between, on the one hand, cases such as *Trivedi*, *Patel* and *Zhang* with, on the other hand, cases such as *Gill*, *Singh 2016* and *Maharjan*. As has been repeatedly emphasised, the present case falls within the first category of those decisions and not the second category. This results from the deliberate forensic decision taken below to run the case that way.

139 139 The majority in *Maharjan* stated at [88] that, while the circumstances of the alleged fraud were different from the facts in *Gill* and *Singh 2016*, it was well-established that it was “undesirable to prescribe in advance the scope of judicial review for third party fraud”, citing *SZSXT* and *Gill*.

140 140 Their Honours added at [90]:

90 Instances of fraud, or bad faith, by those exercising public power are a different category, not presently relevant. In this appeal, as in *SZSXT*, *Gill* and *Singh*, the Court is concerned with the effect of third party fraud on the processes of decision-makers under the Act, and on the processes of the Act itself.

141 141 Later in the joint reasons for judgment of Gilmour and Mortimer JJ, their Honours emphasised at [102] and [103] the following relevant matters where, in the judicial review proceeding, there is a claim of fraud perpetrated by a third party:

- (7) (1) the judicial review applicant is required to prove the fraud and to satisfy the FCCA that he or she was neither complicit in the fraud nor “indifferent to it” in the particular sense explained in *Gill and Singh 2016*, and this is a “heavy burden” (citing *SZRUR v Minister for Immigration and Border Protection* [2013] FCAFC 146; 216 FCR 445 at [51] per Allsop CJ); and
- (8) (2) if the applicant establishes those matters, it would then be necessary for the FCCA to determine how, if at all, the fraud which is proven to have occurred affected the processes by which the visa application was to be considered. This was because, as the High Court held in *SZFDE* (which has been reiterated in several subsequent Full Court decisions), “there must also be fraud ‘on’ the administrative decision-maker, in the sense of the fraud affecting that decision-maker’s statutory functions and obligations, or adversely affecting, disabling or stultifying the processes which the Act prescribes”.

142 142 The majority made the following additional relevant observations at [105]:

105 As the Full Court in *Singh* stated at [45], there is no clear intention disclosed by ss 46 and 47 of the Act that the validity requirements in s 46 are intended to be exhaustive, and in particular are intended to exclude a visa application affected by third party fraud. The concept of a valid visa application, on the current state of authority of this Court, does not include an application made without the actual or otherwise authority of the named visa applicant, where the visa applicant does not have capacity to give authority (see *Kim*) and does not include an application based on fraudulent documents where the visa applicant is neither complicit in the fraud nor indifferent to the use of unlawful or dishonest means (see *Singh* and *Gill*).

143 143 In allowing the appeal and remitting the matter to the FCCA for determination in accordance with the majority’s reasons, Gilmour and Mortimer JJ said at [113]:

113 The appeal should be allowed and the matter should be remitted to the Federal Circuit Court for determination in accordance with this Court’s reasons. Before the Federal Circuit Court, the appellants will bear the onus of proving that the fraud alleged was a fraud perpetrated on the first appellant: that is, that she was neither complicit in it nor “indifferent” to it, in the limited sense explained in *Singh* and *Gill*. The appellants will also need to prove that the submission of those fraudulent documents provided by the Nepalese agent to their migration agent and then to the Minister’s delegate “stultified” the visa application and determination processes for which the *Migration Act* provides. The Minister will be able to both adduce any evidence he considers appropriate, and to test (whether by way of evidence or by way of cross-examination) the appellants’ case. There is in those circumstances no relevant prejudice to the Minister. Whether the Federal Circuit Court is satisfied of the matters alleged, and whether the Court considers declaratory relief as sought to be appropriate, will be matters for it.

(d) Disposition of the appeal

144 144 The following general principles may be derived from the analysis of the above case law.

- (9) (1) Issues of fraud in migration cases can arise in a wide variety of factual circumstances and by reference to different legislative provisions. There is a danger of being too prescriptive in this area.
- (10) (2) Epithets such as that “fraud unravels all” are singularly unhelpful and obscure the need to approach any claim of fraud in a migration context by reference not only to the facts as found by the administrative body or tribunal whose decision is subject to judicial review, but also to the relevant legislative provisions which are said to be affected by such fraud.
- (11) (3) In both a judicial review case and any subsequent appeal, it is important to pay close attention to how the applicant/appellant presents his or her case. Different issues arise if the case simply relates to an alleged misconstruction or misapplication of PIC 4020, as opposed to a case which involves a jurisdictional fact concerning the validity of the visa application in which there is a claim that a person other than the visa applicant has engaged in fraudulent conduct without the knowledge or complicity of the visa applicant, resulting in the visa application being invalid.
- (12) (4) Where an issue of the proper construction or application of PIC 4020 is raised, *Trivedi* and *Patel* authoritatively state that where a visa applicant has given or caused to be given to a relevant decision-maker a document which is a “bogus document” as defined, or information that is false or misleading in a material particular as defined, to determine whether PIC 4020 is satisfied or not, it is not necessary to show knowing complicity by the visa applicant as long as the material is purposely untrue.
- (13) (5) The policy and purpose of PIC 4020 were clearly explained by Buchanan J in *Trivedi* (see [87] above). The construction of PIC 4020 which was adopted and applied in *Trivedi*, *Patel*, *Arora* and *Zhang* may produce what some may view as a harsh outcome for a visa applicant who claims to be the innocent victim of fraud perpetrated by a migration agent or third party. That harshness is ameliorated in large measure, however, by the option available to such a visa applicant to adopt the course which was taken in cases such as *Gill, Singh 2016* and *Maharjan*. The appellant here made a considered forensic decision **not** to follow that course in the FCCA because of

“the evidentiary issues” involved. It is one thing for a judicial review applicant in a jurisdictional fact case to raise a claim of fraud by another person of which the applicant claims to be an innocent victim, in which event the judicial review applicant has the legal onus of proof. It is quite another matter where such a claim is raised before an administrative decision-maker where, depending upon the terms of the relevant legislative provision to which the claim relates, it is generally inapposite to speak of there being a legal onus of proof (see, for example, *McDonald v Director-General of Social Security* (1984) 1 FCR 354 at 357-8 per Woodward J; at 365-6 per Northrop J and at 368-9 per Jenkinson J and *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63; 228 CLR 152 per Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ at [40] where, while noting that it is for a protection visa applicant to establish his or her claims, this did not mean that it was useful to speak in terms of onus of proof).

- (14) (6) *Zhang* illustrates the operation and application of the principles in *Trivedi* and *Patel* to the particular facts and circumstances of that case. Likewise, *Arora* illustrates the operation and application of *Trivedi* in the particular facts and circumstances there.
- (15) (7) In *Trivedi*, the visa applicant personally lodged her visa application and provided a copy of the bogus IELTS test results which, on her case, had been produced by third party agents in India and contained false and misleading information of which she claimed to be unaware. The Full Court took the view, however, that in those circumstances, the visa applicant had “given” the bogus document and false or misleading information to the Department.
- (16) (8) Where there is some evidence to indicate that a visa applicant may not satisfy PIC 4020(1) and the visa applicant claims that his or her migration agent or a third party engaged in fraudulent conduct and provided in support of the person’s visa application a bogus document, or information that is false or misleading in a material particular, and the visa applicant claims that his or her visa application is therefore a nullity, the visa applicant in a judicial review case carries the onus of establishing that:
 - (a) (a) the migration agent or third party was responsible for the fraudulent conduct;

- (b) (b) at the relevant times, the visa applicant had no knowledge of and was not complicit in the fraudulent conduct carried out by the migration agent or third party;
- (c) (c) the visa applicant was not indifferent as to whether the migration agent or third party engaged in the fraudulent conduct in the visa application process; and
- (d) (d) the fraud affected decision-making under the *Act*.

145 145 The primary judge's reasons for dismissing grounds 1 and 2 of the judicial review application are very brief. On one view, they do not engage directly with the appellant's central contention below that the AAT had misconstrued or misapplied PIC 4020 in his particular circumstances. The appellant has not argued on the appeal, however, that the primary judge's reasons for judgment are so inadequate or deficient as to constitute an error of law or a constructive failure to exercise jurisdiction.

146 146 Ground 1 of the appeal squarely raises the issue of whether the primary judge erred in not accepting the appellant's contention below that the AAT had misinterpreted PIC 4020. This ground broadly reflects ground 2 of the judicial review application below.

147 147 The following facts and circumstances are of particular significance in determining the present appeal.

- (17) (1) The central issue in the AAT was whether PIC 4020 was satisfied. No issue was raised there that the AAT lacked jurisdiction to review the delegate's decision because the visa application was invalid for fraud. Rather, the appellant contended before both the delegate and the AAT that he had not given or caused to be given the bogus document, because his brother-in-law had perpetrated a fraud which he did not know about and was not complicit in.
- (18) (2) The AAT found that "someone who did not have authority" altered the IELTS test results **or** that the document was a fraudulent document. Either way, the document was a "bogus document" within the relevant statutory definition.
- (19) (3) The AAT did not identify the person who was responsible for altering the IELTS results. Nor did it make any findings concerning the appellant's claim that he had no knowledge of, and was not complicit in, the fraud. The AAT found that it was

unnecessary for it to make findings on this issue, relying on authorities such as *Vyas*, *Trivedi* and *Sran*.

(20) (4) It was evident on the face of the visa application form which was submitted to the Department that it was submitted by a migration agent and not directly and personally by the appellant, in contrast with the circumstances in cases such as *Trivedi* and *Patel*.

(21) (5) The AAT reasoned that, because the visa applicant “provided” the fraudulent document to the Department as part of his subclass 457 visa application, it could find that he had “given, or caused to be given” to the Department a bogus document or false and misleading information for the purposes of PIC 4020. This is evident from [21] of the AAT’s reasons for decision.

148 148 In our view, the appellant has failed to establish that the primary judge erred in not finding that the AAT misinterpreted or misapplied PIC 4020. The AAT correctly observed in [22] of its reasons for decision (see [47] above) that, in light of cases such as *Vyas*, *Trivedi* and *Sran*, it was not necessary for it to determine whether the visa applicant knew that he was providing a bogus document. That statement was made in the context of the evidence before the AAT and the factual findings set out in [21] of the AAT’s reasons for decision. The AAT’s references to *Vyas* and *Sran* require some qualification having regard to what was said about those decisions in *Trivedi* and *Gill* respectively. But in light of the evidence before the AAT and its findings, the AAT’s reference to, and application of, *Trivedi* was correct. *Patel* is also consistent with the AAT’s approach.

149 149 In our view, neither *Trivedi* nor *Patel* can be distinguished on the basis that, unlike the position in both those cases, the appellant here does not rely only on an alleged absence of knowledge in contending that he did not give, or cause to be given, a bogus document to the Department. He also relies upon the alleged fraudulent conduct of his brother-in-law having occurred **after** the brother-in-law received the certified document from the appellant. We do not consider this feature of the appellant’s case provides a basis for distinguishing *Trivedi* or *Patel*. In both those cases, the respective appellants maintained that documents were altered **before** they were supplied to the respective appellants, who then allegedly passed them on innocently to the Department. In both cases, however, it was held that the visa applicant had to bear responsibility for what was provided to the Department irrespective of them allegedly not knowing that the document they provided was a bogus document. We see no reason why

that approach should not apply here. The appellant must bear responsibility for his brother-in-law's action in providing the bogus document, in circumstances where the appellant plainly contemplated that his brother-in-law would act as his intermediary in dealing with the Department and no issue as to the invalidity of the visa application has been raised.

150 150 The facts in *Zhang* are closer to the facts in the present proceedings in the sense that the alleged fraudulent conduct by the third party occurred after the visa applicant had allegedly provided a non-bogus document to the third party with a view to it being supplied to the Department. As noted in [95] above, the visa applicant in *Zhang* claimed that a third party, who told the visa applicant that he was a senior migration agent and could assist the visa applicant in his visa application, altered the IELTS test results which the visa applicant had provided to the agent for the purpose of lodgement with the Department. The visa applicant in *Zhang* claimed that he did not personally lodge his visa application documents with the Department and that this was done by the agent who subsequently provided him with a Departmental letter acknowledging receipt of his visa application. The visa applicant claimed to have no knowledge of, or any personal involvement in, the agent's fraudulent conduct in altering his IELTS test results. On appeal to this Court, it was held that the primary judge was correct to apply the principles in *Trivedi* and *Patel* to the circumstances in *Zhang* and that it was unnecessary for the MRT to make findings regarding Mr Zhang's claims that he was the innocent victim of his agent's fraudulent conduct.

151 151 The appellant in the present proceeding did not contend that *Zhang* had been incorrectly decided.

152 152 In the present proceeding, it was open to the AAT to find that the appellant had, at the very least, caused the bogus document (or false and misleading information) to be given to the Department because he was content to have his brother-in-law act as his intermediary. He said that he gave various certified documents to his brother-in-law for the purpose of lodging an application for the visa with the Department. The appellant gave no evidence that he sought in any way to control or limit what the brother-in-law did when acting in his capacity as intermediary. The legislative scheme, including PIC 4020, operates on the basis that the visa applicant bears responsibility for a bogus document, or information which is false or misleading in a material particular, if the visa applicant has given the document (or information) to the Department, or caused it to be given. As noted above, the policy underlying this scheme was described by Buchanan J in *Trivedi*. It is a policy which reflects

the volume of administrative decision-making and the limited capacity of the Department to detect and determine who has engaged in fraudulent or dishonest conduct.

153 153 We do not consider that the legislative scheme, which vests responsibility on the visa applicant for what is provided to the Department in support of a visa application, differentiates between the facts and circumstances in *Trivedi* and *Patel* and those here (and in *Zhang*). It was open to the AAT to find that the appellant had given or caused to be given to the Department a bogus document or information that was false or misleading in a material particular. In the particular facts and circumstances here, the appellant bears responsibility for what he contends his brother-in-law subsequently did. Applying *Trivedi* and *Patel*, and having regard to the facts as found by the AAT, it was not necessary for the AAT to determine whether or not the appellant had knowledge of, or was complicit in, the brother-in-law's fraudulent conduct. No significance attaches to the fact that the brother-in-law subsequently retained a migration agent to lodge the documents, including the bogus document, with the Department.

154 154 In our view, the central principles established by cases such as *Trivedi* and *Patel* apply even where a visa applicant provides a non-bogus document to a migration agent or other intermediary, and the migration agent or intermediary alters the document in a way which renders it a bogus document for the purposes of the legislative scheme, and then provides that bogus document to the Department acting on behalf of the visa applicant. In such circumstances, it is not necessary to determine whether or not the visa applicant had knowledge of, or was complicit in, the fraudulent conduct of the migration agent or the intermediary. That is the approach which was taken in *Zhang* and that is the approach which we consider applies to the particular facts and circumstances here.

155 155 For these reasons, ground 1 of the appeal is rejected.

156 156 Taking into account Mr Arch's submissions in relation to ground 2 of the appeal, the appellant's complaint essentially is that the primary judge erred in not accepting the appellant's claim that the AAT fell into jurisdictional error by finding at [21] of its reasons for decision that the appellant had "given, or caused to be given to the Minister a bogus document". The appellant contended that this finding lacked a logical or probative basis. Fact finding by an administrative body is capable of being challenged in a judicial review proceeding on these grounds, but it is well settled that, for the grounds to apply, "extreme

illogicality” must be established. As Crennan and Bell JJ said in *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; 240 CLR 611 at [130]-[131]:

130 In the context of the Tribunal's decision here, “illogicality” or “irrationality” sufficient to give rise to jurisdictional error must mean the decision to which the Tribunal came, in relation to the state of satisfaction required under s 65, is one at which no rational or logical decision maker could arrive on the same evidence. In other words, accepting, for the sake of argument, that an allegation of illogicality or irrationality provides some distinct basis for seeking judicial review of a decision as to a jurisdictional fact, it is nevertheless an allegation of the same order as a complaint that a decision is “clearly unjust” or “arbitrary” or “capricious” or “unreasonable” in the sense that the state of satisfaction mandated by the statute imports a requirement that the opinion as to the state of satisfaction must be one that could be formed by a reasonable person. The same applies in the case of an opinion that a mandated state of satisfaction has not been reached. Not every lapse in logic will give rise to jurisdictional error. A court should be slow, although not unwilling, to interfere in an appropriate case.

131 What was involved here was an issue of jurisdictional fact upon which different minds might reach different conclusions. The complaint of illogicality or irrationality was said to lie in the process of reasoning. But, the test for illogicality or irrationality must be to ask whether logical or rational or reasonable minds might adopt different reasoning or might differ in any decision or finding to be made on evidence upon which the decision is based. If probative evidence can give rise to different processes of reasoning and if logical or rational or reasonable minds might differ in respect of the conclusions to be drawn from that evidence, a decision cannot be said by a reviewing court to be illogical or irrational or unreasonable, simply because one conclusion has been preferred to another possible conclusion.

157 157 A recent example of the application of these principles is *DAO16 v Minister for Immigration and Border Protection* [2018] FCAFC 2. Each case will necessarily turn on its own particular facts and circumstances.

158 158 In our respectful view, the primary judge was correct to conclude that the adverse finding by the AAT, that the appellant had given or caused to be given to the Department the bogus document (or false or misleading information), was reasonably open and did not lack an evident and intelligible justification. At [14] of its reasons for decision, the AAT noted the appellant’s evidence that he had provided the certified documents to his brother-in-law who made arrangements with the original migration agent, and the appellant said that he had had no direct contact with the migration agent. This does not mean, however, that it was not open to the AAT to find that the appellant had given or caused to be given the bogus document to the Department.

159 159 On the evidence before the AAT, the appellant was content to have his brother-in-law act as his intermediary and to provide documents to the Department in support of his visa application. In the events that occurred, the brother-in-law engaged a migration agent to take the final step of lodging the visa application and supporting documents with the Department, including the bogus IELTS test results allegedly manufactured by the brother-in-law. The appellant claimed that he was unaware of his brother-in-law's alleged intervening fraudulent conduct in altering the IELTS test results. The evidence before the AAT was to the effect that the appellant did not have any direct contact with the migration agent but it appears that the appellant did not claim that he was unaware of the fact that his brother-in-law had retained a migration agent. The appellant acknowledged that he had "submitted" his visa application (see [34] above). In these circumstances, it was reasonably open to the AAT to find that the appellant "provided" to the Department the documents in support of his visa application, including the bogus document. Similarly, it was reasonably open to the AAT to find that the appellant had given or caused to be given a bogus document to the Department, having regard to his knowledge and willingness for his brother-in-law to act as his intermediary. The position might be different if a visa applicant is totally unaware of the fact that a visa application has ostensibly been made on his or her behalf by a migration agent, whether or not an intermediary is also involved.

160 160 For these reasons ground 2 is rejected.

CONCLUSION

161 161 The appeal should be dismissed and the appellant ordered to pay the first respondent's costs, as agreed or assessed.

I certify that the preceding one hundred and forty-one (141) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Griffiths and Moshinsky.

Associate:

Dated: 5 April 2018